

1970

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

WILLIAM R. WALLACE,

Defendant and Appellant.

Case No.
11684

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third Judicial District
Court for Salt Lake County,
Hon. Leonard Elton, Judge

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ROOFING, a corporation,

Defendants, and

WILLIAM R. WALLACE,

Defendant and Appellant.

Case No.
11684

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for the sum of \$ 2,601.28, with interest from the 7th day of October, 1964, for labor and the material furnished the defendants by the plaintiff at the special instance and request of the defendants.

DISPOSITION IN THE LOWER COURT

The Court found the issues in favor of the plaintiff and against the defendants William R. Wallace and Rus Wallace Roofing, and against the plaintiff and in favor of the defendants Jim Pappas and Mrs. William R. Wallace, no cause for action.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks to have its judgement against the defendants William R. Wallace and Rus Wallace Roofing, a corporation, affirmed.

STATEMENT OF THE FACTS

It should be noted at the outset that the names William R. Wallace and Rus Wallace refer to the same person. (T. 52-24 and 28). Rus Wallace Roofing is referred to as the corporation. Since this appeal is taken only on behalf of the defendant William R. Wallace, the word defendant, used hereafter in this brief, will refer only to him, William R. Wallace.

The plaintiff dissagrees with the statement of facts set out in the defendant's brief in five particulars:

1. At the bottom of page 2 it states that "Pappas constructed three warehouses for the corporation."

"Q. You built it for Wallace?

"A. Built it for William R. Wallace. I sold him the property and built him the building. That was the third one I built in that area for Mr. Wallace."
(T. 52-22).

2. First paragraph on page 3. The deed in evidence, Exhibit p-15 dated August 13, 1963, seems to settle the fact that the property, on which the warehouse was built and the blacktop laid by the plaintiff, was owned by the defendant William R. Wallace.

"THE COURT: Does that refer to the warehouse property?"

"A. Yes sir." (T.12-6).

3. The end of the second paragraph on page 4, that "Pappas told plaintiff that Pappas would pay for the job," does not seem to be born out by the record.

"A. Then on September the 3rd, 1964, a Mr. Wallace called on the telephone and asked when we were going to do the Wallace warehouse job." (T.15-17. Jack Ringwood's testimony).

"Q. Now, did you talk to Mr. Ringwood again about the Wallace job?"

"A. Yes. The next time--Mr. Wallace called me one morning and told me--he asked me if I could get anybody to get the black topping down, because on this warehouse he was using part of it, and I think he had the other part rented off. . . . So I told him, yes. And I told him what W. W. Gardner had bid on the job. And Mr. Wallace agreed it was a good price. And he said that if he--if you go ahead and see if you can get somebody down to look it over and I'll show him what there is to be done and how much to be done and see if we can get it done and that.

"Q. Who said that?"

"A. Rus Wallace." (T. 54-14).

4. The bottom of the 2nd paragraph of page 4 of the defendant's brief should show that Jack Ringwood "made the notation".

"Q. What did he say to you if you remember or your notes indicate?

"A. According to my notes he said he was Russ Wallace and he wanted to know when we were going to get the Wallace Warehouse job done." (T.16-10. Jack Ringwood's testimony).

5. Paragraph one of page 5 of the defendant's brief quotes a notation from the bottom of the plaintiff's billing, plaintiff's exhibit P-1.

Some light is shed on this matter when the version of Mr. Pappas of the same conversation is considered, which the defendant fails to mention:

"Q. When did you first know that W. W. Gardner was going to look to you for payment of this job?

"A. Well, I received an invoice in the mail made out to me. And upon receipt of that invoice I took it to Mr. Wallace and gave it to him personally. And I says, "This is the job. This is the one that you agreed to pay.' And Russ says that he would pay it.

"Q. When was that?

"A. I don't remember the date, but it was a day or two after I received an invoice from W. W. Gardner.

"Q. Did you contact W. W. Gardner Company about that invoice?

"A. No. But then the following month I got a statement from W. W. Gardner, and then I took the statement down to Russ Wallace. And then the next time I got a statement from W. W. Gardner, I was kind of surprised. And then I called Jack Ringwood on the phone and told him that this job was to be paid by Russ Wallace and that he should be billed."
(T. 58-14.)

With these exceptions the plaintiff accepts and adopts the defendants statement of facts.

ARGUMENT

POINT I.

THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUSTAIN THE RULING OF THE COURT IN AWARDING JUDGEMENT FOR THE PLAINTIFF AGAINST THE DEFENDANT WILLIAM R. WALLACE.

Since the plaintiff has completely performed it's part of the contract, there would be no merit to the defendant's claim that the plaintiff's claim would be barred by the statute of frauds.

27 C.J. 350 paragraph 430, "Performance by one party...But the great weight of authority supports the rule that the statute of frauds has no application where there has been a full and complete performance of the contract by one of the contracting parties, and the party so performing may sue upon the contract in a court of law. He is not compelled to abandon the contract and sue in equity or upon a quantum meruit."

The defendant, in urging lack of evidence to support the judgement, has completely overlooked the testimony of Jim Pappas, which shows without any doubt whatever, that the defendant knew the price asked, that he ordered the work and that he agreed to pay the bill.

The following is from the transcript of the evidence.

Page 55, line 25: "Russ called me and said, 'Jim, W. W. Gardner is not on the job. Why don't you call them and see if you can get them on the job.'... And I told Russ, I says, 'Why don't you call Mr. Ringwood?' And I give him his number. 'It's your job. You are going to pay for it. You call him.' So Russ says he would."

Page 56, line 18: "A. No. I remember Russ calling me, and I would call Mr. Ringwood to try--I was trying to help Russ get his job done, and I thought I had a little more influence with Mr. Ringwood than Russ had."

Page 58, line 16: "A. Well, I received an invoice in the mail made out to me. And upon receipt of that invoice, I took it to Mr. Wallace and give it to him personally. And I says, 'This is the job. This is the one you agreed to pay.' and Russ says that he would pay it."

Page 64, line 4: "Q. Yes. Why did you give Mr. Wallace the advantage of your bid if the price was lower than he could get? A. Mr. Wallace asked me to."

Page 68, line 5: "I called Jack Ringwood and told him it wasn't my job and he would look to Russ Wallace to pay, because Russ Wallace agreed that he would pay it."

Page 70, line 5: "I didn't pay it. I didn't get paid for it."

Page 72, line 14: "A. I don't remember too well, but I think I tried to get ahold of Russ Wallace. I've gotten ahold of Russ Wallace quite a few times about this bill. And I told him, I says, 'You got a good job. You got a reasonable figure. You agreed to pay it. Now, pay the bill.' "

Page 76, line 3: "A. I told him that this job was to be billed to Russ Wallace and that he would pay for it, and he agreed to pay for it."

Page 77, line 11: "A. Russ Wallace was the one that agreed to pay the bill and so I was referring to Russ Wallace."

Page 78, line 22: "A. No. I remember the conversation. I remember calling him. And I remember telling him to bill Russ Wallace and that he would pay for it. I remember--that was the necessary reason for calling him. That is why I remember that."

CONCLUSION

Summing up, it is the position of the plaintiff that the court must adopt the rule laid down in the Thorley v. Kolob Fish and Game Club and C. W. Parry, 13 Utah 2nd 294, 373 P 2nd 574, at 577:

"Appellant's contention that the evidence does not support the findings is unfounded. There is substantial evidence for the plaintiff, and therefore, under the well known appellate rules, we cannot disturb the judgement."

and that the judgement of the lower court should be affirmed.

Respectfully submitted,

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