

1967

Del S. Ashworth and Joe H. Ashworth, D/B/A  
Ashworth Architects, A Partnership v. Gene Glover,  
D/B/A Genie Boys : Brief of Respondent

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# IN THE SUPREME COURT OF THE STATE OF UTAH

DEL S. ASHWORTH and JOE  
H. ASHWORTH, d/b/a ASHWORTH  
ARCHITECTS, a partnership,

*Plaintiffs and Appellants,*

v.

GENE GLOVER, d/b/a  
GENIE BOYS,

*Defendant and Respondent.*

Case No.  
10679

UNIVERSITY OF UTAH

MAY 18 1967

## BRIEF OF RESPONDENT LAW LIBRARY

Appeal from Judgment of Fourth Judicial District Court  
Utah County, State of Utah  
The Honorable Joseph E. Nelson, Judge

Richard C. Dibblee of  
Rawlings, Wallace, Roberts & Black  
530 Judge Building  
Salt Lake City, Utah  
*Attorneys for Defendant-Respondent*

Jackson B. Howard for  
Howard and Lewis  
Delphi Building  
120 East 300 North  
Provo, Utah  
*Attorneys for Plaintiffs-Appellants*

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## BRIEF OF RESPONDENT

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### STATEMENT OF THE KIND OF CASE

This is an action to recover general and punitive damages for alleged infringement of a common law copyright.

### DISPOSITION IN THE LOWER COURT

The court entered judgment for defendant-respondent, No Cause of Action. (R.51.)

## RELIEF SOUGHT ON APPEAL

Plaintiffs-Appellants seek reversal of the decision or a new trial.

## STATEMENT OF FACTS

The parties will be referred to as they appear in the lower court.

Plaintiffs are licensed architects and instituted this action to recover damages for the alleged unauthorized copying by defendant of a set of their architectural plans. Plaintiffs claim the set of plans was protected by a common law copyright and the act of defendant was an infringement of their rights. Defendant admitted copying the plans but denied plaintiffs were entitled to damages for two reasons. First, any copyright had been lost by the general publication by the architects of their plans and, second, if the plans were protected by a copyright, the particular set which defendant examined and took information from did not belong to the plaintiffs but was the property of a third party.

The plaintiff Del S. Ashworth testified that during the year 1960 Ashworth Architects were employed by Allen's Products Company to prepare plans and specifications required for the construction of a drive-in restaurant to be built in American Fork, Utah. (TR. 40-42). [The same plans were used during the year 1962 for the construction of a similar drive-in at Springville, Utah.] The witness testified that to complete their contract of

employment it would have been necessary to have printed additional copies of their plans. The copies were distributed in the following manner:

(a) One copy was filed with the American Fork Zoning Department to secure a building permit. (TR. 64, 78).

(b) Approximately 50 copies were distributed to the building contractors for both the American Fork and Springville projects. Each contractor paid a \$25.00 deposit which plaintiffs forfeited if the contractor desired to keep the plans. (TR. 58).

(c) One copy to the client, Allen's Products Company. (TR. 55).

(d) One copy to the Springville Zoning Department to secure a building permit.

Mr. Owen G. Richardson, Manager of the American Fork Drive-In appeared as a witness who testified he was acquainted with defendant and during the spring of 1962 permitted defendant to examine the set of plans kept in the office. The manager testified he did not restrict defendant as to the use of the plans. (TR. 9-18).

Defendant appeared as a witness and acknowledged receiving the plans from the manager, Richardson, and admitted making notes from them. (TR. 130-32). He also testified he used some of the information in the construction of his own drive-in restaurant, but claimed there is considerable difference between the two structures. Defendant denied the existence of any agreement between

himself and Richardson whereby Richardson would receive an interest in defendant's drive-in for allowing him to see the plans. (TR. 97).

This case was tried to the court without a jury, and the court made findings of fact and conclusions of law and awarded judgment to defendant, No Cause of Action. Plaintiff has appealed from said judgment.

## ARGUMENT

### POINT I

#### THE TRIAL COURT PROPERLY FOUND THE ISSUES IN FAVOR OF DEFENDANT.

As previously stated, plaintiffs claim the architectural plans which they prepared for their client, Allen's Products Company, were protected by a common law copyright. Plaintiffs further claim there was an infringement of this copyright by defendant when he examined and copied the plans.

This is a case of first impression in this State. The existence of a common law copyright has been recognized in the few limited decisions on the subject. All of these authorities hold, however, that such a copyright may be lost if there has been a general publication of the plans by the architect. This legal principle is stated in 5 Am. Jr. 2d, Architects, Sec. 10 P. 672 in the following language:

“It is well settled at common law that an author or creator of a literary or intellectual production

has a property right thereto which exists independently of and notwithstanding copyright statutes and entitles him to the exclusive use of his production before publication, such property right being commonly referred to as a common-law copyright. A few courts, to varying degrees, have recognized that these principles apply to architects and architectural plans, drawings, or designs. But a common-law copyright may be lost by a general, as distinguished from a limited, publication thereof, and therefore the question arises as to what constitutes a publication of architectural plans, drawings, or designs so as to result in the loss of a common-law copyright. There is authority to the effect that exposure of a house to public view was a publication which destroyed an architect's common-law copyright to the plans or design. In other instances, the filing of architect's plans with a building department to obtain permission to build has been held to be a publication resulting in the loss of the common-law copyright. \* \* \* "

See also 77 A.L.R. 2d, 1036.

In the recent case of *Read v. Turner*, 48 Cal. Rep. 919, 924 the court in reversing a judgment in favor of the architect for alleged infringement of his copyright set forth the standards to be used in determining whether there has been a limited or general publication of plans. The court stated:

“Factors to be considered in determining whether a publication is general or limited are the intention of the owner, viz, whether his acts of publication are indicative of an intent that the subject of the copyright may be used by the

general public; the character of the communication or exhibition affecting the publication; the nature of the subject of the copyright as relating to the method of communication or exhibition in question; and the nature of the right protected. To ascertain the intention of the owner, an objective rather than a subjective test is applied. '(T)he court will look to what he does rather than to what he claims he intended. The implications of his outward actions to the reasonable outsider are controlling.' "

In establishing this intent, courts have considered as material, evidence relative to the distribution which may have been made of the plans. In the case of *Shanahan v. Macco*, 36 Cal. Rep. 584, the court, in holding there was a general publication, stated as follows:

"Mr. Shanahan testified there were approximately 40 categories of subcontractors involved in construction of each of their tracts, and that at least two or three, and sometimes five or six, bids were received in each category before a contract was awarded. Each of the several bidding subcontractors in each of these 40 categories examined the subject plans in detail, and approximately 25 of the successful bidders at each of plaintiffs five tracts received sets of the detailed plans. The subcontractors who received these plans were requested, when they began work, to return them when the work was finished. Plaintiffs, however, did not follow up at the completion of the work to obtain compliance with this request, and never reported the loss of any of these plans. Plaintiffs also submitted their plans to some five financing institutions, none of which returned them."

Also at page 589:

“Here the architect limited the use of his plans, both as to the persons allowed to use the work (the Carrs and their agent the builders) and to the use which such persons might make of the work (the construction of one house). This limitation as to persons and use has been held to be the test of a limited publication.”

Another factor which the courts have considered material in determining the intent of the architect involves the agreement between the architect and his client. In the case of *Smith v. Paul*, 174 Cal. App. 2d 744, 345 P. 2d 546, 77 A.L.R. 2d 1036, the court reversed the trial court which found there was no publication by the architect, but in so ruling, made the following observation concerning the contract of employment:

“The decision in the Wright case is weakened somewhat by the fact \* \* \* that the plaintiff architect had transferred to the person for whom he had prepared the plans, all property rights therein, *whereas in our case the plaintiff architect retained their ownership.*”

See also *Edgar H. Wood Associates, Inc., v. Skeen, et al.*, 197 N.E. 2d 886:

“In both New York cases, it appears that a further reason for denying recovery was the absence of an agreement between the architect and his client that the ownership of the plans should not pass to the client by virtue of the commission. The substitute bill before us alleges that Wood specifically retained its property rights in the plans in its agreement with Moylan.”

Defendant respectfully submits that in applying the foregoing principles to the case at bar, it is clear the trial court correctly entered a judgment in favor of defendant.

Consider the conduct of these plaintiffs in dealing with their architectural plans prior to the alleged infringement by defendant.

*First*, plaintiffs failed to indicate on the plans the same were protected by a copyright.

*Second*, within a two year period approximately fifty sets were distributed to building contractors who were permitted to keep them by forfeiting a \$25.00 deposit.

*Third*, in the contract of employment plaintiffs did not retain title or ownership to the plans.

*Fourth*, plaintiffs permitted their client to use the same plans for the construction of a second drive-in at Springville, and did not demand or receive the customary architectural fee.

*Fifth*, copies were filed with the zoning departments in the cities of American Fork and Springville, Utah.

*Sixth*, a copy was given to the client Allen's Products Company.

*Seventh*, no restrictions upon either the building contractors or the client were imposed as to the use they could make of the plans.

We submit, that under the "objective test" the foregoing actions on the part of plaintiffs are indicative of

an intent that the subject matter of their plans may be used by the general public. There is not one bit of evidence in this record, other than their own statements, which would prove to the contrary. While they are now claiming these plans were their own property, they admitted the client used them without paying any fee. The evidence also shows that building contractors, with the necessary fee of \$25.00, received the plans, without restriction, and could keep them for that price. If the plaintiffs were so desirous of protecting the subject matter of these plans why wouldn't they attempt by some means to notify the contractors of this fact, and restrict the use to be made of them. The plaintiffs have failed to meet the requirements of the "objective test." They should not be allowed to complain if someone from the general public copied information from the plans.

In view of the foregoing the trial court properly found the issues in favor of the defendant and against plaintiffs.

## POINT II

THE ARCHITECTURAL PLANS EXAMINED BY DEFENDANT WERE NOT THE PROPERTY OF PLAINTIFFS.

Without abandoning the argument under Point I of this brief, defendant submits that regardless of the application of the law pertaining to common law copyrights, plaintiffs are still not entitled to be awarded judgment on the facts of this case.

As previously stated, the evidence was to the effect that plaintiffs, after completion of the plans, delivered a set to their client, Allen's Products Company, and received payment of their fee in full. This set of plans was then placed in the office of the American Fork Drive-in and as such came under the supervision and control of the manager, Richardson. Richardson testified he gave this set of plans to defendant and permitted him to examine them without restriction.

In view of the foregoing evidence, it is defendant's position that the plans which he saw and copied belonged to Allen's Products Company and not to these plaintiffs. It is our position that it would be the same situation if defendant had been granted the same opportunity by one of the general contractors who purchased a set of the plans from plaintiffs.

In their brief, plaintiffs claim that the act of Richardson in giving the plans to defendant was a violation of his authority and bordered upon a criminal act which entitled plaintiffs to be awarded punitive damages. There is no evidence to support such a claim. Plaintiffs did not introduce any testimony by any representative of Allen's Products Company that Richardson was not authorized to permit someone to examine these plans. Plaintiffs have simply failed in their proof on this point and they cannot prove a substantive matter of this kind by inference.

## CONCLUSION

In conclusion, defendant respectfully submits that the evidence clearly establishes and supports the decision of the trial court that any alleged copyright plaintiffs may have had in and to their plans has been lost by their subsequent conduct. In addition, the evidence clearly supports the trial court's finding that the set of plans which defendant examined was not the property of plaintiffs. The decision of the trial court on both fact and law should be affirmed.

Respectfully submitted,

RICHARD C. DIBBLE of  
Rawlings, Wallace, Roberts & Black  
*Attorneys for Respondent*

530 Judge Building  
Salt Lake City, Utah