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Neil Carlisle And Merrill Ewell Dba Carlisle And Ewell v. Clifford Cox And Allen Cox And v. Lewis Kofford : Brief of Appellant

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In The Supreme C
of the State of U

NEIL CARLISLE and MERRIL
EWELL dba CARLISLE AN
EWELL, a partnership,

Plaintiffs and Respon

-vs-

CLIFORD COX and ALLEN

Defendants and A

and,

V. LEWIS KOFFORD,

BRIEF OF A

Appeal from the judgment
of Utah County, Honorable A

FR

J. B

Att

and A

110 So
Provo,

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In The Supreme Court of the State of Utah

NEIL CARLISLE and MERRILL EWELL dba CARLISLE AND EWELL, a partnership,
Plaintiffs and Respondents,

-vs-

CLIFORD COX and ALLEN COX,
Defendants and Appellants,

and,

V. LEWIS KOFFORD,
Defendant.

Case No. 12802

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This was an action brought by plaintiffs and respondents, Neil Carlise and Merrill Ewell dba Carlisle and Ewell, based upon UCA 14-2-1 et. seq. (as amended). Plaintiffs alleged they were unpaid subcontractors under a contract calling for the purchase and installation of a furnace in a building owned by defendants and appellants, Allen and Clifford Cox. Defendant Lewis Kofford was alleged to be the general contractor.

DISPOSITION IN LOWER COURT

The case was tried to the court sitting without a jury, the Honorable Allen B. Sorenson, Judge. Shortly after the pre-trial conference, the trial court denied Cox's motion to amend the court's pre-trial order which limited the defenses of the defendants Cox and further refused to allow the Coxes to add a counterclaim or a crossclaim. Thereafter at trial, the court refused to hear evidence by defendants, Allen and Clifford Cox, relating to any defense they might have, legal or equitable, except for the question if the plaintiffs' action had been timely filed. The court found against defendants, Allen and Clifford Cox, on that issue and granted judgment against Allen and Clifford Cox in the amount of $1,551.00 together with interest at 8% per annum from the date of the decree.

RELIEF SOUGHT ON APPEAL

Defendants and appellants, Allen and Clifford Cox, request the Supreme Court's order reversing the trial court's judgment, or in the alternative, remanding this action back to the trial court with instructions to permit the Cox's counterclaim and cross complaint and to take evidence and make findings of fact and conclusions of law relating to the Cox's equitable and legal defenses against plaintiffs.

STATEMENT OF FACTS

This action was filed by the plaintiffs, Neil Carlisle and Merrill Ewell, dba Carlisle and Ewell, on February 13, 1970. (See clerk's notation on the back of plaintiffs' complaint.) Plaintiffs' attorney was Noall T. Wootton of American Fork, Utah; defendants and appellants, Allen and Clifford Cox, retained Leon M. Frazier as counsel, and the defendant, V. Lewis Kofford, retained Robert Moody of Provo, Utah, as counsel.

Mr. Frazier answered the plaintiffs' complaint by making a general denial and then made a motion to dismiss plaintiffs' complaint upon the ground that it was not timely filed. The motion was denied, but Mr. Frazier thereafter did not amend his answer to raise additional defenses or add a counterclaim or crossclaim. In November of 1970, Mr. Frazier handled the answering or interrogatories posed by the plaintiffs to the defendants, Allen and Clifford Cox.

In late November of 1970, Mr. Frazier fell ill with what proved to be terminal brain cancer and thereafter died in July of 1971 with no further work having been done on this case.

A pre-trial conference was scheduled for October 8, 1971. Due to the death of Mr. Frazier, the defendant Coxes retained J. Brent Wood as counsel to represent them at the conference. Mr. Wood was not very well acquainted with the facts of the case, but due to his

relatively little trial experience, he allowed the pre-trial conference to be held as scheduled. The court was aware of Mr. Wood's difficult position (R. 32).

At the pre-trial conference the various issues to be tried were discussed including the applicability of the bonding statute and its one year statute of limitation. While Mr. Wood agreed that the bonding statute was apparently applicable, he insisted that the plaintiffs show that they were equitably entitled to relief under the statute. That is to say that their own knowledge of certain facts, their own actions and the original agreement and understanding of the parties as to payment would not, as a matter of equity, bar them from the benefits of the bonding statute. Mr. Wood clearly raised this issue at the pre-trial conference (see pre-trial transcript, p. 3).

When the pre-trial order was received by counsel, the order did not contain these equitable defenses of the Coxes. Mr. Wood moved to amend the pre-trial order. (Record on Appeal, item 29). At the hearing on this motion, the court stated that it felt that Mr. Wood was really asking to amend the pleadings. Mr. Wood responded that he did not believe that it was really necessary to amend the pleadings to allow the defenses discussed at pre-trial to be tried. Mr. Wood then stated that with his *present knowledge* of the case, he would like to amend the pleadings to include counterclaims against the other parties and so moved the court.

The court's subsequent minute entry dated November 5, 1971, denied all of the motions. The same entry

shows that the trial court understood Mr. Wood's motions to *correct* the pre-trial order concerning the defendants' defenses and to allow counterclaims by amending the pleadings (see Record on Appeal, item 33).

On the issues allowed at trial, the following facts were presented. The subject subcontract was for the purchase and installation of a 160,000 BTU furnace with an approximate value of $1900.00 in a maintenance shed being built by the defendant Kofford for the Coxes. The plaintiffs had the burden of showing that they were within the one year statute of limitations required by UCA 14-2-1 et. seq. which meant that all work had to be complete on or prior to February 13, 1969. It was uncontroverted that the bulk of the installation work was done during November of 1968 and that the job was inspected and passed by a Mt. Fuel Supply serviceman on December 6, 1968 (R. 48). By that date, the work was complete except for installing a register cover on a heat duct. On or about December 23, 1968, the plaintiffs returned to the maintenance shed to install the register. The shed had been in use since the December 6th inspction by Mt. Fuel. The plaintiffs then introduced evidence that they were short one register cover on December 23rd which was back ordered by one of their suppliers.

The plaintiffs conceded at trial (R. 23-24) that they did not consider the grill or register to be very im-

portant to the job. The plaintiffs conceded that rather than wait some unknown amount of time for one supplier to get the register, they could have purchased it from a number of other suppliers (R. 21-23). The plaintiffs admitted that their supplier, in fact, merely purchased the registers from another competing supplier and sold it to the plaintiffs (see note on plaintiffs' exhibit No. 3).

The plaintiffs conceded that after receiving the register, no special efforts were made to install the allegedly missing register. Plaintiff Carlisle admits "stopping by" the maintenance shed several times on his way into town on other business, but stated that he didn't find the door open until February 19, 1969, when he allegedly walked into the shed and dropped the register into its place in the cement floor. The plaintiff admits that he did not consider the missing register mportant enough to arrange a tme for its installation with the Coxes by phoning them on one of their several 24 hour phones listed in the telephone directory. (R. 35-37 and 66-67) The counsel for the plaintiffs agreed and stipulated (R. 67-68) that the plaintiff Carlisle could have installed the register earlier than February 19, 1969 "if there had been a great enough urgency."

When asked by Mr. Wood how the plaintiff could recall when he installed the last register, the plaintiff, from the stand, produced an unrecorded lien (defendants' exhibit No. 5) on the property which was prepared the morning after the last work was allegedly

performed. The plaintiff admitted that he had not filed the lien which would have put the Coxes on notice of non-payment because he promised the defendant Kofford that he would not file it (R. 33). A year later, after the defendant Kofford went bankrupt, the plaintiffs advised the defendants of non-payment and filed suit under UCA § 14-2-1, as amended.

The existence of defendants' exhibit No. 5 was not known to Mr. Wood or the Coxes prior to the trial. A close examination of the completion date on the mechanic's lien (defendants' exhibit No. 5) signed by Neil Carlisle shows that the completion date was obviously changed from December 23, 1968 to February 19, 1969. the back of the card attached to defendants' exhibit No. 5 shows the work date of October 24 through December 23, 1968. Plaintiff admitted that he had the card in his desk at work with the lien for two years but he could not explain the dates and would not admit to ownership of the card attached to his lien document (R. 72-79). The trial court refused all attempts of Mr. Wood to introduce the lien or card into evidence. The document was ultimately introduced by counsel for defendant V. Lewis Kofford relative to another issue.

The plaintiffs introduced evidence (see plaintiffs' exhibit No. 3) that the value of the register was two dollars and twenty-six cents ($2.26).

The defendant Cox introduced evidence tending to show that the job was complete just prior to Christmas when the registers were installed. (R. 46-49; 51-52; 64).

The Coxes testified that they were at the maintenance shed a high percentage of the time during January and February and had the plaintiffs stopped at the shed as many times as they claimed during the normal hours, they would have been there (R. 58-61; 66-67). They testified that all registers were installed in December.

The Coxes further testified that the plaintiffs never attempted to phone them or otherwise make an effort to install the allegedly missing register. The Coxes further testified that they were never asked to pay the plaintiffs for the work done nor were they ever told by the plaintiffs that they had not been paid. They testified that they had no knowledge of non-payment until the suit was filed a year later.

Over Mr. Wood's repeated objections, the court refused to take evidence or consider any equitable defense or avoidance based on the actions of the plaintiffs or on the understanding of the parties as to responsibility of payment. Mr. Wood attempted but was precluded from introducing evidence to show:

(a) That the plaintiffs from the inception of the contract, understood and agreed that they would look only to Mr. Kofford for payment; that the Coxes would not be paying Kofford cash for the heating and plumbing subcontract work as it was to be paid by an offset for monies owed by Kofford to Cox; that the plaintiffs were *not* the *low* bidders for the subcontract work but they would be given the work even at their higher bid if they recognized the "offset payment" to

Kofford and would look only to him for payment. (R. 30 and 91).

(b) That the plaintiffs looked only to Kofford for payment for a full year after the completion of the work; that the plaintiffs never asked the defendant Cox for payment; that the plaintiffs never filed a lien against the Coxes even though one was prepared because the plaintiffs agreed with the defendant Kofford not to file the lien (R. 33-34).

(c) That the plaintiffs deliberately participated and conspired with Mr. Kofford in keeping the Coxes ignorant of the plaintiffs' alleged non-payment to further their own interest i.e.: (1) If the Coxes discovered the non-payment they would not continue to do excavation and sewer work for Kofford on a credit basis; (2) if the Coxes discovered the non-payment, they would have pressed for the balance due them from Kofford which would have caused the financial collapse of Kofford to the substancial injury of the plaintiffs who were major creditors of the defendants Kofford; (3) if the Coxes did not discover the non-payment then the plaintiff could work himself into a position to be treated as a preferred creditor if and when financial collapse of Kofford came. (See R. 91 & 99-101, where plaintiffs admit receiving all of defendant Kofford's assets which were applied to and satisfied all other contract work between the plaintiffs and defendant Kofford. The other creditors of Kofford, such as the Coxes, remain unpaid.)

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FORMULATING ITS PRE-TRIAL ORDER RULE 16, U.R.C.P.) AND FURTHER ERRED IN REFUSING APPELLANTS' TIMELY MOTION TO AMEND THAT ORDER BOTH OF WHICH CAUSED THE APPELLANTS TO BE DENIED A HEARING OF THEIR CASE UPON ITS MERITS.

Rule 16 of the Utah Rules of Civil Procedure controls pre-trial procedure and the formation and effect of the court's pre-trial order. A pre-trial order entered into at variance with the rule would not be binding on the parties. Paragraph five of Rule 16 ". . . limits the issues for trial to those *not disposed of by admissions or agreements of counsel* . . ." (emphasis added) The transcript of the pre-trial conference (pre-trial transcript, p. 3) supports Mr. Wood's claim that he had raised all of his defenses against the plaintiffs. Certainly, the transcript of the pre-trial conference does not support an argument that Mr. Wood had stipulated or agreed to dispose of all of his client's defenses except the issue as to whether or not plaintiffs' action was timely filed. Nor does Rule 16 (5) permit the unsupported conclusions of the court to be binding upon the parties; the language is specific in disposing only

of those issues agreed to by counsel by way of admissions or agreement. If there was a mistake or misunderstanding (and that may have been the case) then the trial court should have allowed Mr. Wood's timely motion to amend the pre-trial as to those issues which he claimed were improperly omitted.

It is, of course, clear that there must be some point in the pre-trial process at which the issues to be litigated at trial was bindingly determined. However, the basic policy considerations underlying Rule 16 are that the parties and the court have notice, and ample time, to prepare for the issues which are to be litigated at trial. This explains why the "manifest injustice" rule of Rule 16 applies to attempts to modify the pre-trial order at trial.

As noted in an article entitled "Federal Pre-trial Practice: A Study of Modification and Sanctions" found at 51 Geo.L.J. 309 (1963), the purpose of the federal rules (and in this case, the Utah rule is the same as the federal rule) is to "avoid the tendency of the common law to punish a litigant for his counsel's negligences and oversights by depriving him of his right to be heard on the merits" (Id. at 309-310) while at the same time, to eliminate the possibility of surprise at trial to opposing counsel. There are no policy reasons to support the trial court in limiting the issues at trial and thereby denying a party a hearing on the merits when a timely modificaton of the pre-tral order could have been made without causing surprise or inconvenience

to opposing counsel or the court. This view would seem to explain why the "manifest injustice" rule of Rule 16 is directed to attempts *at trial* to modify the pre-trial order which deprive opposing counsel of notice. It also explains why nearly all of the annotations in *Moore's Federal Practice* relating to Rule 16 are concerned with amendments *at trial* and not prior thereto. (See, for example, *Monod vs. Futura, Inc.,* 415 F.2nd 1170 (1969)) This view seems borne out by Judge Holtzoff in *McCarthy vs. Lerner Stores Corporation,* 9 FRD 31 (DDC 1949) where he stated:

> "if counsel *waits until the trial,* he is bound by the pre-trial order, unless the trial court relieves him of the pre-trial order to prevent manifest injustice. Of course, it is contemplated that this will be done only in exceptional cases as otherwise the adverse party may be taken by surprise and in a proper case, may be come entitled to a continuance and possibly a mis-trial if the case is tried before a jury. (emphasis added)

In *Smith Contracting Corporation vs. Trojan Construction* Co., Inc., 192 F 2nd 234 (10th Circut 1951), the 10th Circuit remanded the cause back to the trial court with instructions to include a counterclaim precluded by the pre-trial order. The court there said:

> We are of the opinion, however, that rigid adherance to pre-trial conference agreements

> should not be exacted *especially where so to do will result in injustice to one party and relaxing of such agreement will not cause prejudice ot the other party.* Requiring rigid adherance to pre-trial conference agreements will tend to discourage cooperation of counsel and their willingness to agree at the pre-trial conference as to the real and substantive issues to be presented and will impair the effectiveness of the pre-trial conference procedure. (emphasis added)

Rule 16 permits an amendment at trial to an otherwise binding pre-trial order where to do otherwise would impose "manifest injustice" upon one of the parties. The trial court's refusal to hear defendants and appellants' case upon its merits resulted in "manifest injustice" to them and an amendment of the pre-trial order should have been permitted at trial. Thus, the trial court's refusal to amend the pre-trial order upon timely motion made *well before* trial should be reversed and the matter remanded to the trial court for hearing upon the issues excluded at trial. See, *Central Distributors Inc. vs. M.E.T. Inc.,* 403 F.2nd 943 (1968).

It cannot be seriously argued that the defendants and appellants, Allen and Clifford Cox, received a full hearing of their case on its merits. Also, it can be quite forcefully argued that, if the Coxes could prove the matters contained in their offer of proof they may very well have defeated the plaintiffs' right to recover. See,

for example, *Apex Lumber vs. Commanche Construction Co.,* 18 Utah 2nd 119, 419 P.2nd 121, 132 (1966) for an instance in which plaintiffs' conduct was held to have estopped them from the benefits of UCA 14-2-1 et. seq. as amended.

Thus, in a case such as the one at bar where the trial court's ruling has clearly denied a party a hearing upon the merits of his case and quite possibly has affected the outcome of the trial, it should obviously follow that such a ruling should have been correct and should have been supported by the most compelling of policy reasons.

POINT II

THE TRIAL COURT ERRED IN FAILING TO CONCLUDE THAT THE PLAINTIFFS AND RESPONDENTS WERE ESTOPPED FROM CLAIMING THE BENEFITS OF UCA 14-2-1 et. seq. AS AMENDED, BECAUSE OF THE COURSE OF THEIR CONDUCT RELATIVE TO THE SUBJECT CONTRACT.

Even under the facts allowed to be introduced at trial, the trial court as a matter of law and equity should have found that the plaintiffs' actions estopped them from recovering. The plaintiffs admitted that they didn't file a lien on Coxes property because the defendant Kofford asked them not to file it as "the money

was on the way and it wouldn't be necessary to file the lien." (R. 33-34). Apparently, months later the plaintiff took all of the equipment owned by Kofford as security on the balance owed by Kofford. The equipment was given to secure *all* debts between the plaintiffs and the defendant Kofford (R. 90). Then Kofford helped the plaintiffs sell most of the equipment to satisfy the debts (R. 90).

Mr. Kofford was allowed to use some of the equipment from time to time and actually kept some of the equipment. When Kofford's corporation finally became insolvent, the plaintiffs on their own determined the value of the security held, sold some of it and applied the credits. The plaintiffs determined the value of the remaining equipment and how the credit was to be applied. The court would not allow Mr. Wood to question plaintiffs' evaluation (R. 90-93). Further, the plaintiff admits that he credited all other jobs (debts) between the plaintiffs and defendant Kofford before he applied any credit to the Cox job. (On the other jobs the plaintiff had waived his lien rights in favor of State Savings & Loan Association.)

Kofford had many subcontractors who were creditors including the Coxes. The plaintiffs did not notify the Coxes that they had not been paid for the furnace work until the plaintiffs acquired all of the assets of the defendant Kofford, sold what they wanted to sell, kept the rest, applied the monies to the jobs they desired and then sued Cox for an alleged balance due.

In sober silence to the everlasting damage of other creditors, the plaintiffs consumed the assets of the defendant Kofford and then complained that it wasn't enough to make them whole. They now assert that they really did not rely on the defendant Kofford for payment, they merely failed to approach the Coxes for payment until the defendant Kofford was insolvent.

By looking to Kofford for payment, failing to lien or notify the Coxes of non-payment, accepting equipment as security for payment and by selecting which accounts to credit for the value of the equipment estops them as a matter of law and equity from recovery from the Coxes. *Apex Lumber Co. vs. Commanche Construction Co.,* 18 Utah 2nd 119, 417 P.2nd 131.

POINT III

AS A MATTER OF LAW, THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE LAST MATERIAL WAS SUPPLIED AND THE LAST LABOR PERFORMED ON THE SUBJECT CONTRACT ON OR BEFORE DECEMBER 23, 1968.

Even assuming that one register was not installed on or before December 23, 1968, and was left until February 19, 1969, the court erred in not ruling as a matter of law that the contract was completed on December 23, 1968.

Apparently, plaintiff considered the job complete long before February 19, 1969, as he testified that he had an appointment to prepare a lien for the 20th of February.

(a) The lien was apparently originally prepared with December 23, 1968 as the completion date and later changed. This change was only noticed by defendant Cox's counsel after the conclusion of the trial when counsel received a copy of the original from the court clerk.

The actions of plaintiff either show that (1) he considered the job complete enough to have an appointment to prepare a lien on the property and/or (2) plaintiff intentionally and/or deliberately withheld final performance on the contract until he could meet with his attorney to prepare lien. This deliberate delay would also bar his recovery.

Plaintiffs' lack of concern for obtaining and installing the register is further evidence that the plaintiffs considered the job complete. Plaintiff testified that he made no attempt to secure the back-ordered register — even though the register was readily available from other suppliers. Plaintiffs were so unconcerned with the last register that they made no attempt to purchase the item from any of the many supply stores in the Utah County and Salt Lake City area.

Plaintiffs' further unconcern for the delivery of the final register is evident by the fact that he failed to contact the defendant Cox by phone or stopping by the

Cox home and office which is only several blocks from the building. The defendant Cox has several telephone numbers including a 24 hour number listed in the directory but the plaintiffs did not make any phone attempts or visit attempts to set a time for the delivery of the one register.

The plaintiffs never made any effort or special trips to install the register. Plaintiff Carlisle merely stated "Well, you can see the building from the freeway, and we do quite a bit of work in Provo, and each time I would go by I would either stop in or notice if there were any trucks or people around the building. I would say probably four attempts before I got in the building." (R. 18). This inaction can only lead to an inference of unconcern for the minor act of delivery or an intentional failure to deliver in the attempt to keep the filing period running while the plaintiff attempted to collect from defendant Kofford.

(b) Regardless of plantiffs' negligent attitude in obtaining and delivering the register and regardless of whether he intentionally attempted to continue the running of the filing period, the final delivery of a $2.26 register which required no labor to drop in a hole, is so insignificant an act that the court erred in not ruling as a matter of law that the job complete, for all purposes contemplated by the bonding statute.

The $2.26 register represents .0011385 percent of the heating and plumbing subcontract. This means that

even according to the plaintiffs' evidence, the job was 99.99887 percent complete on December 23, 1968..Certainly, if the defendants Cox under some remote theory were to claim that the defendant failed to complete the contract in December, the court would consider such a claim as ridiculous.

Some courts in construing mechanic lien statutes have accepted the least scintilla of work as being sufficient to keep the job from being considered complete. Such decisions work an injustice on the unsuspecting public.

The Utah Supreme Court to date has never had occasion to rule directly on the issue of substantial completion as actual completion under UCA 14-2-1 as amended. Certainly the facts of this case afford the court with ample justification for requiring more than a scintilla of work or material to cause a job to remain uncompleted. It was not disputed at trial that nearly all of the work was completed on the furnace by December of 1968, sufficiently that the job was inspected and passed by Mt. Fuel Supply on December 6, 1968. By February of 1969 the job undisputedly was virtually complete except that plaintiffs alleged that a small grill or register which covers the end of a duct had not been installed because it had been back-ordered, and this Mr. Carlisle claimed to do on February 19th of that year.

Even assuming that the register was installed as claimed, the plaintiffs concede (R. 23-24) that the grill

in question was not particularly important and that plaintiffs made no special effort to obtain it. They also admitted that Mr. Carlisle carried the grill with him in his truck for nearly a month before taking it into the shop and dropping it into place. Also, the dates on the mechanic's lien provided for the job in question demonstrate beyond a doubt that Mr. Carlisle considered the job completed before February of 1969.

This court has recognized in *Apex Lumber v. Commanche Construction Co.,* 18 Utah 2nd 119, 419 P.2nd, the difficult burden of UCA 14-2-1 and therefore should look with askance at the scintilla of work theory when construing UCA 14-2-1. The minute value of the undelivered register (requiring no labor to drop it in a hole) coupled with the plaintiffs' unconcern and casual treatment of the obtaining and delivery of the part, etc. mentioned above, justly require a finding of December 23, 1968 as being the date of completion of the contract.

Respectfully submitted,

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