1975

Richard S. Bennett, Wallace F. Bennett And Harold H. Bennett Association v. Arnel K. Downard v. Claris E. Johnson And Velma Johnson And Boyd J. Clark And Iris J. Clark : Brief of Plaintiffs-Respondents Bennett

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

RICHARD S. BENNETT, WALLACE F. BENNETT, and HAROLD H. BENNETT, Trustees, dba THE BENNETT ASSOCIATION,
Plaintiffs and Respondents,

vs.

Arnel ~~ARNEY~~ K. DOWNARD,
Defendant and Respondent,

vs.

CLARIS E. JOHNSON and VELMA JOHNSON and BOYD J. CLARK and IRIS J. CLARK,
Defendants and Appellants.

Case No. 13740

BRIEF OF PLAINTIFFS-RESPONDENTS BENNETT

ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT OF WEBER COUNTY, UTAH, THE HONORABLE JOHN F. WAHLQUIST, DISTRICT JUDGE, PRESIDING.

PAUL THATCHER
1018 First Security Bank Building
Ogden, Utah 84401
and JOSEPH S. NELSON
55 West 1st South
Salt Lake City, Utah 84101
Attorneys for Plaintiffs-Respondents Bennett

GEORGE B. HANDY
Attorney for Defendants-Appellants Johnson and Clark
521 Eccles Building
Ogden, Utah 84401

PHILLIP R. FISHLER
Attorney for Defendant-Respondent Downard
804 Boston Building
Salt Lake City, Utah 84111

LORRAINE PRESS 1297 SOUTH MAIN STREET SALT LAKE CITY, UTAH PHONE 487-0681

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

COURT DECISIONS CITED

TABLE OF CONTENTS—Continued

STATUTES CITED

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

RICHARD S. BENNETT, WALLACE F. BENNETT, and HAROLD H. BENNETT, Trustees, dba THE BENNETT ASSOCIATION,
Plaintiffs and Respondents,

vs.

ARNEY K. DOWNARD,
Defendant and Respondent,

vs.

CLARIS E. JOHNSON and VELMA JOHNSON and BOYD J. CLARK and IRIS J. CLARK,
Defendants and Appellants.

Case No. 13740

BRIEF OF PLAINTIFFS-RESPONDENTS BENNETT

NATURE OF CASE

Appellants' statement of the "Nature of the Case" is *incorrect* in one critical point: Defendant Downard's

able the sum of $30,000.00 to be used, as hereinafter provided, for the construction of the building in accordance with the plans and specifications to be approved by the Lessor, and that all such funds will be placed with First Security State Bank of Salt Lake City under the direct supervision of a proper officer of said firm and to be disbursed by such officer in accordance with the terms and provisions of the construction agreement in connection with such project. Any unused funds to remain to credit of Lessor.

That the Lessee will immediately upon the execution of this agreement provide, at the sole expense of the Lessee, the necessary plans and specifications in connection with such construction project, all of which will be subject to the final approval of the Lessor. Lessee will engage in a contract with a suitable contractor, duly bonded, for the construction of such project in accordance with the plans and specifications, with the right in the Lessee at all times and at the expense of the Lessee to inspect such construction project during the process of construction, and with the further right in the Lessee to approve the particular contractor selected to construct such project and in the determination of the contract price of construction.

That the Lessee will be solely responsible for the payment of any and all sums necessary to complete said building and improvement project, mutually decided upon, over and above the said $30,000.00 to be provided by the Lessor herein, and in the event any such excess funds are necessary that they will be provided promptly by the Lessee in order that such project of construction will not be delayed in any manner.

The next paragraph of the Agreement originally provided that the Lessor would provide a concrete retaining wall on the property, but this was amended by the parties by interlineation to provide that in lieu of the wall the Lessor would provide an additional $2,000.00 in money.

While the Agreement provided that the terms of the leasehold would begin 5 days after notice of completion of the building, it contained an additional provision that in any event the term would start not longer than 90 days from the date of notice by the Lessor that the construction funds were available. Rental was payable from the beginning of the term at the rate of $650 per month.

The Johnsons and Clarks borrowed the $32,000.00 which was to be their contribution to the cost of building construction from First Security State Bank in Salt Lake. (R. 250-251.) The proceeds of this loan were set up by the bank in a special account for the benefit of the Johnsons and the Clarks but under the control of a bank officer, as apparently contemplated by their construction Agreement with Taco Siesta. (Defendants' Exhibit 4, R. 251-256.)

Building plans were prepared and approved, and anarchitect, Joe Lewis Wilkins, retained to supervise construction. The record seems to be silent or unclear as to just who retained Mr. Wilkins.

Under date of August 25, 1968, a "Standard Form

of Agreement Between Owner and Contractor" was executed. It recites that it is between "Claris E. Johnson . . . the owner, and Arnel K. Downard Construction Co., the contractor." In the space provided for the "owner" it is signed "Joe Lewis Wilkins, TACO SIESTA for Clair Johnson." The contract appears to be a printed form of document provided by the American Institute of Architects, and contains minimal provisions. *It is noteworthy that nowhere in the contract is there any provision whatsoever which requires the contractor Downard to pay laborers and materialmen furnishing labor or materials for the building construction.* The agreed contract price is $31,860.00, exclusive of landscaping, blacktop and fill.

On the same day, pursuant to demand made upon him by the Johnsons and Clarks, the contractor Downard procured from United States Fidelity and Guaranty Company an Indemnity Bond in the amount of $31,860.00 running to the appellant Claris E. Johnson as Obligee. (Plaintiffs' Exhibit B, Johnsons' testimony, R. 257, 266 and 267.)

Because the conditions of this Bond are also of critical importance, we set out as follows the essential conditions of the Bond.

> NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, That if the said Principal shall well and truly perform and fulfill all and every covenants, conditions, stipulations and agreements in said contract mentioned to be performed and fulfilled, and

shall keep the said Obligee harmless and indemnified from and against all and every claim, demand, judgment, lien, cost and fee of every description incurred in suits or otherwise against the said Obligee, growing out of or incurred in the prosecution of said work according to the terms of said contract, and shall repay to the said Obligee all sums of money which the said Obligee may pay to other persons on account of work and labor done or materials furnished on or for said contract, and if the said Principal shall pay to the said Obligee all damages or forfeitures which may be sustained by reason of the non-performance or mal-performance on the part of the said Principal of any of the covenants, conditions, stipulations and agreements of said contract, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

* * * * * *

The Surety shall not be liable under this bond to the Obligees, or either of them, unless said Obligees, or either of them, shall make payments to the Principal strictly in accordance with the terms of said contract as to payment and shall perform all the other obligations to be performed under said contract at the time and in the manner therein set forth.

It is to be noted that the Bond runs only to the Owner as Obligee, and does not run "to all other persons as their interest may appear," (Laborers and materialmen) as required by Section 14-2-1, U. C. A., 1953.

This Bond, Plaintiffs' Exhibit B, according to John-

son, was supplied to him shortly after "we started the job." (R. 257, Lines 3 to 10.)

It must also be noted that the Bond, Plaintiffs' Exhibit B, not only runs to Claris E. Johnson as Obligee, but recites that the Principal (Downard) "has executed and entered into a certain contract with *said Obligee* dated 8/25/68 CONSTRUCTION TACO SIESTA FACILITY AT 3715 SOUTH WASHINGTON, SOUTH OGDEN, UTAH, in said contract described . . ." From the time he had received that Bond sometime in August of 1968, or very shortly thereafter, when work on the contract was just beginning, appellant Johnson had information sufficient to put him on inquiry as to his being the Owner named in the construction contract referred to.

With this knowledge Johnson proceeded to act as the Owner and dealt directly with the contractor Downard throughout the construction procedures. Periodically during the construction work as Mr. Downard got underway with the building construction under his contract with Mr. Johnson, and as each progress payment became due, Mr. Downard would present Mr. Johnson with a statement of monies owing sub-contractors, materialmen, et cetera, and then Johnson and Downard would go to the bank and exhibit the bills submitted by Downard, and the bank would give to Johnson its check in an amount sufficient to pay the bills and progress payment. Mr. Johnson would endorse the bank check and deposit it in a special account which he and his

partners had caused to be set up in his name as managing partner so that he could make the payments for sums due Downard. Then Johnson would make checks to Downard and to sub-contractors and Downard for the amounts due and owing and deliver those personal checks on the special account to Downard. However, on some occasions the bank's check was endorsed directly to Downard or to sub-contractor and delivered to him rather than clearing through Johnson's special personal account. (R. 254, Line 12 to 256, Line 19; Defendants' Exhibit 4.) Johnson never gave a check or cash to Taco Siesta out of the account. (R. 256, Line 30 to 257, Line 2.) Taco Siesta never paid Downard any money on the contract. When he started the job he had nothing to do with anyone except with the Owner. Johnson personally asked Downard to furnish the Bond, plaintiffs' Exhibit B and Johnson never told Downard to get any of his money from Taco Siesta. (R. 277 to 280.)

Although the Agreement of April 12, 1968, (Defendants' Exhibit 2) required the Johnsons and Clarks to post $32,000.00 for the construction costs of the building to be built in cooperation with Taco Siesta, and the contract with Downard provided that the Owners would pay Downard $31,860.00 exclusve of landscaping, blacktop and fill, and Johnson undertook, to make the payments direct to Downard or to Downard and the subcontractors, Johnson, in breach of both contracts, deducted various amounts, and, by his own sworn testimony, paid Downard or his sub-contractors only a total

of $29,179.81 (R. 253-254), leaving Downard without funds to pay materialmen like the plaintiffs. This was in breach of the condition of the Contractor's Bond providing that surety should not be liable to the Obligees (Johnsons) unless the Obligees "shall make payments to the Principal (Downard) strictly in accordance with the terms of said contract as to payment . . ." And this, of course, was done after he had received the Bond from Downard and had notice of its contents and of the fact therein contained that Downard's contract specified Johnson as the Owner obligated thereunder.

It is undisputed that plaintiffs Bennett furnished materials and labor used in the construction of the building of the reasonable value claimed, upon which Johnson made on part payment by his personal check (Defendants' Exhibit 3) dated May 17, 1969, leaving a balance owing Bennetts in the amount for which judgment was rendered.

When the unpaid balance was not fortcoming, Mr. Winters, Credit Manager for Bennetts, telephoned Mr. Claris Johnson at a Salt Lake number (Johnson's place of employment) furnished by Downard and received assurances from Mr. Johnson that things were going to work out. It would just take time. There were several conversations over a period of time but no collection was effected and finally Mr. Johnson indicated that there was a Bond that would provide protection. Winters asked for a copy of the Bond and Johnson replied he didn't have the Bond and would have to get the informa-

tion. Winters asked for a copy of the Bond and Johnson indicated that Winters could have a copy but failed to produce it. He did, however, furnish him over the telephone the number of the Bond and advised that it had been written by a man named Squires at the Eastman Hatch Company. Mr. Winters called Squires, who told him that the Bond was not a standard performance or payment Bond as known in the construction industry and that the Bond accrued not to the protection of materialmen and suppliers but accrued to the protection of Mr. Johnson from the failure of Mr. Downard, and if there was a loss resulting the claim against the Bond would have to be filed by Mr. Johnson. He called Mr. Johnson again and again asked for a copy of the Bond and was told that Bennetts could have a copy of it, but the Bond copy never came, although Johnson admitted he had the Bond in his files in Ogden. (R. 233 to 236.) Mr. Winters checked with the Recorder's Office and found that Johnsons and Clarks were owners of record, and assumed that they were the contracting owners in the light of the facts disclosed to him. (R. 241 and R. 239.)

Mr. Johnson testified he recalled Mr. Winters calling him in Salt Lake several times about the matter. He recalls telling Mr. Winters that he had the Bond in Ogden and that perhaps the easiest way to get a copy was to contact Eastman Hatch Company, who handled the transaction. While Mr. Johnson testified that he did not "refuse" to show Mr. Winters the Bond, there

is absolutely no contention made that he ever did furnish a copy or exhibit the Bond to Mr. Winters. (R. 289 to 292.) Johnson admitted he could be mistaken about his recollection that he wasn't requested to take the Bond out of his file and bring it to Salt Lake to show it to Mr. Winters. (R. 294.)

The jury brought in a special verdict, quoted by appellants in their statement of facts, to the effect that the defendants Johnson and Clark had failed to exhibit the Bond to the representative of the Bennetts upon request made, and judgment for the plaintiff followed pursuant to the statute. At the beginning of the trial the Bennetts moved for judgment against defendants Johnson and Clark upon the ground that it appeared, without controversy, that they were the owners of the property improved, that they contracted with Taco Siesta for the making of the improvements and ratified and adopted the construction contract with Downard as their contract, and that the Bond was insufficient as a matter of law in that it does not meet the statutory requirements. The motion was denied. (R. 213-214.)

ARGUMENT

POINT I.

THE AGREEMENT OF THE JOHNSONS AND CLARKS WITH TACO SIESTA (DEFENDANTS' EXHIBIT 2) AND THE CONSTRUCTION CONTRACT (DEFENDANTS' EXHIBIT 1) THEREIN PROVIDED FOR

ARE IN EFFECT ONE CONTRACT FOR THE IMPROVEMENT OF THEIR LAND, AND INTEREST THEREIN, BRINGING THEM WITHIN THE BOND REQUIREMENTS OF SECTIONS 14-2-1 AND 14-2-2, U. C. A.

Because the AGREEMENT (Defendants' Exhibit 2) specifically refers to and requires that a contract be entered into for the construction of a restaurant facility upon the lands owned by the Johnsons and Clarks, it must be construed together with the construction contract (Defendants' Exhibit 1) executed for them by the architect on the job and by them ratified and adopted by their subsequent acceptance of the benefits and recognition of their obligations to make payments thereunder, and their control of such payments, after notice that the contract had been executed in Johnson's name. *DeLuxe Glass Company* v. *Martin*, 116 Ut. 144, 208 P. 2no 1127, Headnote 2, (relied on by appellants) and cases therein cited.

It is noteworthy that said AGREEMENT recites the understanding and agreement of the parties thereto that "in order for the Lessee to enjoy the use of said property . . . it is necessary to proceed with the construction of a building on said property . . ." Further, by that Agreement the plans are subject to the approval by the Lessor, and the construction contractor must be duly bonded. It is also particularly noteworthy that the parties to this Agreement thought it necessary to specific-

ally provide that the *Lessee* (Taco Siesta) should have "the right . . . to inspect such construction project during the process of construction, and with the further *right in the Lessee to approve* the particular contractors selected to construct such project . . ." (Emphasis Supplied.) And it also must be remembered that the contract provided that the Johnsons and Clarks would pay the full contemplated costs of construction through their own disbursing agent.

It is also obvious, and noteworthy, that the restaurant building contemplated was one of a permanent nature, which would not only make the leasehold useful to the Lessee, but would be a permanent improvement upon the reversionary ownership of the Johnsons and the Clarks. Under the recitals in the Agreement, it is also obvious and apparent that the building was necessary in order to secure to the Johnsons and the Clarks the reserved rentals provided for, which in themselves constitute an interest in land. And it is undisputed that the Johnsons and the Clarks were the owners of the fee in the land to be improved by the construction of the building. Certainly this constitutes an "interest in land" within the meaning of the statute!

The provisions of Utah Statutes "are to be liberally construed with a view to effect the objects of the statutes and to promote justice." *Section* 68-3-2, *U. C. A.* Furthermore this court has ruled that the Bond Statutes in question must be interpreted and applied in such manner as to carry out the purpose for which they were

created: To protect those who supply labor and materials, and that they are akin to the Mechanics Lien Statutes in that they are designed to prevent a landowner from taking the benefit of improvements placed on his property without paying for labor and materials that went into it. *Metals Manufacturing Company* v. *Bank of Commerce*, 16 Ut. 2nd 74, 395 Pac. 2nd 914; *King Brothers, Inc.* v. *Utah Dry Kiln Company*, 13 Ut. 2nd 339, 374 Pac. 2nd 254, 21 Ut. 2nd 43, 440 Pac. 2nd 17.

Giving the statutes in question the required liberal construction to effect the protection of the materialmen, Bennetts, and to avoid the unjust enrichment of the owners of the property improved, it seems too clear for argument that the Johnsons and Clarks, as the owners of the fee, and of the reserved rentals under the lease intended to take effect on completion of the building, were the owners of "any interest" in the land which was improved in part by Bennett's contribution, within the meaning of the statute.

It is respectfully submitted that it is also abundantly clear that the AGREEMENT between the Johnsons and the Clarks and Taco Siesta providing for the construction of improvements on the lands of the former before the effective date of the lease to the latter, considered in connection with the construction contract in the name of Claris Johnson, the managing partner of the Johnson-Clark partnership, adopted and ratified by Johnson's acts, and the bond itself, demanded and received by Johnson and naming him as the owner with whom Down-

ard had contracted to construct the building, construed as part of the same transaction, constitute together a contract for the improvement of the lands of the Johnsons and the Clarks as owners within the meaning of the Bonding Statute.

In this connection it should be noted that there is not one scintilla of evidence to show that Bennetts had any knowledge or notice of the provisions of the Agreement, Defendants' Exhibit 2 stating that the Lessee (Taco Siesta) will engage in a contract with a suitable contractor for the construction of the project. Nor is there one scintilla of evidence that Taco Siesta itself ever did enter into any such contract with the contractor Downard. And, in this connection, it is the established law of Utah that suppliers of material for the improvement of realty are not bound by the unknown provisions of private contracts between the landlord and a tenant with respect to the installation of improvements on the real property, as it would be unfair to bind such suppliers to the terms of agreements to which they were not parties and of whose content they had no knowledge. See *Metals Manufacturing Company, supra,* quoted in *King Brothers, Inc.* v. *Utah Dry Kiln Company,* 21 Ut. 2nd 43, 440 Pac. 2nd 17, 18.

It is further respectfully submitted that the arrangement between the Johnsons and the Clarks and Taco Siesta was in effect a joint business enterprise and one in which Taco Siesta was in effect the agent of the Johnsons and the Clarks in making inquiries as to Downard's

availability and probable price as a construction contractor. As to the joint venture, see

Parker v. *Trefry* (Cal.), 136 Pac. 2nd 55;

Garrett v. *Kimbrel* (Colo.), 376 Pac. 2nd 376; and

In Re Schmidt (7th Circuit), 320 Fed. 2and 213.

And, in *Mid-West Engineering Construction Company* v. *Campagna* (Mo.), 397 S. W. 2nd 616, it was held that whenever a lease contains a covenant requiring the Lessee to make improvements of substantial and permanent nature, the Lessee is the agent of the Lessor for the purposes of subjecting the Lessor's reversion to mechanics liens incident to the making of such improvements. It must be remembered that this honorable court has, as indicated, held that our Bonding Statutes here involved are exactly analogous to our mechanics lien laws.

It is therefore respectfully submitted that the contractual arrangements for the improvement of the lands belonging to the Johnsons and the Clarks amounted to contracts for the improvement of their lands requiring them to provide a good and sufficient Bond as required by Section 14-2-1, U. C. A. *King Brothers, Inc., supra,* cited and relied on by appellants, does not support appellants' position, but rather the position of the Bennetts. It resulted in a mandate of this Honorable Court to enter Judgment in favor of the plaintiff materialmen against the defendant sued as an owner of an interest in the land in question.

POINT II.

THE JUDGMENT FOR PLAINTIFFS SHOUL BE AFFIRMED IN ANY EVENT BECAUSE THE BOND FURNISHED (PLAINTIFFS' EXHIBIT B) FAILS TO MEET THE MANDATORY REQUIREMENTS OF SECTION 14-2-1, U. C. A., AND THE LOWER COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR JUDGMENT BECAUSE OF THE LEGAL INSUFFICIENCY OF SAID BOND.

The conditions of the Bond obtained by Claris E. Johnson for his partnership are (1) that the contractor shall perform the covenants and agreements of the construction contract, (2) the contractor shall indemnify the owner Johnson from all claims, demands, costs et cetera, against the Obligee Johnson growing out of the contract work, (3) the contractor shall repay Johnson all monies paid to other persons on account of labor done or materials furnished for the contract, and (4) the contractor shall pay the Obligee Johnson all damages sustained by reason of the non-performance or mal-performance of the contractr of covenants and conditions of the construction contract. If the contractor Downard performs those obligations, then the Bond is void, otherwise in full force. It contains *no* provisions, as required by the statute, for the prompt payment for material furnished and labor performed under the contract. It does not purport to run to "other persons as their inter-

ests may appear," as required by the statute. It does refer to the construction contract between Johnson and Downard, but that "short form" contract, Defendants' Exhibit 1 *contains no provisions whatsoever by which Downard specifically covenants and agrees to pay for all material furnished and labor performed in the construction work.* In this it differs very materially from the construction contract involved in the principal case relied on by appellants Johnson and Clark, as we shall make clear.

Thus, in the case before the court, even though the requirements of the contract are to be read into the Bond, there is no provision providing for the payment of labors and materialmen. It is purely a Bond to indemnify Johnson against loss or claims: In effect it is an insurance policy for Johnson insuring him, and him alone, against loss or damage arising out of Downard's activities in the performance of the construction contract. It will be recalled that Bennett's Credit Manager, Mr. Winters, at the suggestion of Mr. Johnson called Mr. Squires at the Eastman Hatch Company, which was the agency for the bonding company and inquired about the Bond, and Squires, in giving his own interpretation of the Bond he had written, told Mr. Winters that the Bond was not a standard performance or payment bond where materialmen could make claims against the Bonds and that the Bond accrued not to the protection of materialmen but to the protection of Mr. Johnson only, who had the sole right to file a claim thereon. (R. 236.) It is

submitted that this interpretation of the Bond by the bonding company's agent who wrote the same removes any doubt, and that the Bond is only an indemnity for Johnson upon which the Bennetts have no claim. Accordingly it does not provide the protection required by the statute and the Johnsons and Clarks, as owners benefitted, are liable.

The appellants in their brief cite and rely upon *DeLuxe Glass Company* v. *Martin*, 116 Ut. 144, 208 Pac. 2nd 1127. The case is not in point and has no application to the facts here before the court. In *DeLuxe Glass Company*, the Bond required the principal (contractor) to "perform and fulfill all the . . . agreements of said contract . . ." The construction contract there specifically provided that "the contractor shall provide *and pay for all materials, labor*, . . . and other facilities necessary" for completion of the work. This court very properly and correctly ruled that the provision of the Bond guaranteeing performance of this clause in the construction contract was in effect a provision for the Benefit of materialmen and laborers as third party beneficiaries, who could bring their action thereon. However, in the construction contract now before the court there is *no provision* comparable to the quoted provision in the *DeLuxe Glass Company* contract. The managing partner Johnson recognized this when he insisted on personally paying all approved bills.

Inasmuch as the Bond now before the court does not protect Bennetts, even when the construction con-

tract is read as a part of the Bond, the Bond is obviously insufficient and fails to provide the Bennetts the protection required by the statute, and accordingly upon consideration of these insufficiencies in the Bond they were entitled, as a matter of law to their judgment against the Johnsons and Clarks as owners of the property benefitted by the Bennetts' materials and labors.

The case now at bar is governed by this court's later decision in *Boise-Payette Lumber Company* v. *Phoenix Indemnity Company*, 3 Ut. 2nd 150, 280 Pac. 2nd 448. In that case this court distinguished *DeLuxe Glass Company, supra*, noting the absence of any provision in the construction contract by which the contractor agreed to pay laborers and materialmen, and that the Bond only provided for indemnification of loss or damages by reason of the failure of the Principal (contractor) "to faithfully perform said contract," ruled that *DeLuxe Glass Company* was not applicable and that the Bond neither directly or indirectly gave protection to the materialmen, but only to the owner, and that therefore the materialmen had his cause of action under the statute against the owner. There are no later Utah decisions on the point in question, and *Boise-Payette Lumber Company, supra*, now states the law of the State of Utah to the facts now before the court.

There is another reason why the Bond in the case at bar is insufficient to satisfy the statute in question: *It is totally void by reason of the breach of the terms thereof by the Obligees, the defendants Johnson and*

Clark. This would be true even if the Bennetts, contrary to the considerations above set out, could be held to be third party beneficiaries of the bonding company's obligation to the Johnsons and Clarks and entitled to sue thereon if the Johnsons and Clarks could sue thereon.

It will be recalled that the Bond contained a specific provision that "the surety shall not be liable under this Bond . . . unless said Obligees, or either of them, *shall make payments to the Principal (Downard) strictly in accordance with the terms of said contract as to payment* . . ." (Emphasis Supplied.)

The contract and the Bond required Johnson and Clark as owners to pay the contractor Downard $31,860.00, exclusive of landscaping, blacktop and fill, as the contract price. However, it will be remembered that Johnson, in breach of this condition of the Bond admitted and testified under oath that he paid Downard or his sub-contractors a total of *only* $29,179.81. (R. 253-254.) And it will be remembered that Johnson himself managed and controlled all payments directly.

This manifestly breached the condition of the Bond so that the bonding company was released even from its agreed direct liability to Johnson. Clearly where the direct Obligee had no claim against the company, one holding a derivative claim as a possible third party beneficiary, could have no claim.

Accordingly there was no effective Bond to protect the Bennetts, by reason of Johnson's breach and default,

and Bennetts are entitled to have their judgment against the owners affirmed for failure to provide and maintain an effective Bond to protect the Bennetts as materialmen and laborers.

It is respectfully submitted that the foregoing considerations require that the judgment below be affirmed, and make it unnecessary to consider other questions raised by the appellants. However, as in duty bound, and in an attempt to assist the court, we shall consider the other points involved.

POINT III.

THE TRIAL COURT DID NOT ERR IN DENYING JOHNSON AND CLARK'S MOTION TO DISMISS BENNETTS' COMPLAINT.

Under POINT I of the ARGUMENT in appellants' brief, the appellants contend that the court should have granted their motion, made at the conclusion of the evidence, for the dismissal of Bennetts' complaint. This contention, is in turn based upon the unfounded assumption that the facts and evidence show that there was no contract entered into by the Johnsons and the Clarks for the construction of the building in question upon the land admittedly owned by the Johnsons and Clarks. We shall not burden the court with a repetition of the evidence presented, as hereinbefore set out in our Statement of Facts, but shall merely recall that the basic AGREEMENT, Defendants' Exhibit 2, between the Johnsons and the Clarks and Taco Siesta was itself clearly and un-

disputedly "a contract involving $500 or more for the construction . . . of any building . . . upon land," within the terms of the statute. And in recognition of the obligation of the owners, Johnson and Clark, it required that the actual contractor to be selected (with only the "approval" of the Lessee), to be "duly bonded." Further, Johnson demanded and received from Downard a Bond to indemnify him. The trouble was, that the Bond was in substance an indemnity bond for Johnsons and Clarks, and not a payment bond for laborers and materialmen, and it was invalidated by Johnson's breach thereof in refusing to pay Downard the full amount of the contract price, as required by the terms thereof.

Furthermore, the actual construction contract with Downard was in the name of Johnson, the managing partner for the Johnsons and Clarks, a role which he, with notice of that fact in the Bond, proceeded to accept and exploit by controlling all of the payments made out of the funds provided by Johnsons and Clarks, as contracting owners, for the construction of the building on their land. And the jury, after hearing all of the evidence and the arguments of counsel, found that it was proven by a preponderance of the evidence that the defendant, Johnson, was a party to the construction contract with Downard, Defendants' Exhibit 1. Clearly there is some evidence to support the jury's verdict, which is therefore conclusive. We respectfully submit that the trial court committed no error in denying the motion of defendants

Johnson and Clark for dismissal of the plaintiffs' complaint.

POINT IV.

THE TRIAL COURT DID NOT ERR IN DENYING JOHNSON AND CLARK'S MOTION TO DISMISS DEFENDANT DOWNARD'S CROSS-CLAIM AGAINST THEM.

In responding to this issue raised by "POINT II" of the appellants' brief, the Bennetts should observe that they are only indirectly interested in Mr. Downard's judgment against the Johnsons and the Clarks for the balance due on his construction contract. They do not have an interest, as they have a judgment against Downard, but it would appear that Downard can pay Bennetts only if the Johnsons and Clarks pay him what what they owe. However Bennetts wish only to be paid once for their materials and labor.

No doubt Mr. Downard's counsel will argue this matter more fully, but Bennetts are content to submit this matter upon the evidence hereinbefore summarized, and upon the special verdict of the jury to the effect that Johnson was a party to and bound by the construction contract made in his name by the architect and accepted and confirmed by him ~~in his name by the architect and accepted and confirmed by him by his subsequent~~ actions. Perhaps it might be helpful to the court to add that even if the contract had been executed between Taco Siesta and Downard, the Johnsons and

Clarks would be bound thereby because, as heretofore indicated, the formation of the contract, if made by Taco Siesta, would have been in furtherance of a joint enterprise, and Taco Siesta was, under the basic agreement, Defendants' Exhibit 2, the effective agent of the Johnson and the Clarks for the purpose of effecting a a construction contract for the improvement of their land so that it could be leased to Taco Siesta.

There was no error in the trial court's denial of appellants' motion to dismiss Downard's cross-claim against the Johnsons and Clarks.

POINT V.

THE LOWER COURT DID NOT ERR IN GIVING INSTRUCTION NUMBER 2.

Under POINT III of their brief the appellants Johnson and Clark take exception to the court's submitting to the jury interrogatory number 2, with the related explanation, inquiring whether it was proved by a preponderance of the evidence that the defendant Johnson was a party to the construction contract Defendants' Exhibit 1. Appellants contend that there was no evidence whatsoever in the record to justify the submission of this issue to the jury for decision. Apparently not only the court, but the jury disagree with appellants' position, for the jury *unanimously* returned its special verdict to the effect that it was proved by a preponderance of the evidence that Johnson was a party to the construction contract.

This contention of appellants is a clear sample of "wishful thinking," for the record of the testimony and the exhibits are replete with evidence supporting the conclusion that Johnson, as managing partner of appellants' partnership, was a party to the construction contract.

First, the basic agreement, Defendants' Exhibit 2, providing for the construction of the building to improve appellants' land at their expense, clearly establishes a joint enterprise for such construction, in which each party would be the agent of the other for the purpose of accomplishing the project, and also the agency of Taco Siesta for the owner in obtaining a contractor to accomplish this basic purpose. The evidence clearly establishes that the architect, Wilkins, was retained as the acting representative of the parties to the joint enterprise. Although Downard admitted that he quoted a construction contract price, in the first instance, to a Taco Siesta representative, he further testified that in this case, as in other cases in which he had built restaurants for owners leasing to Taco Siesta, his dealing with respect to the actual contract and the performance thereof were entirely with the property owners. The architect Wilkins prepared a printed form of construction contract in the name of appellant Johnson, the managing partner, and pursuant to the authority contained in the basic agreement, signed the same for Johnson. Johnson himself admitted, under oath, that he, as owners' representative, personally demanded of Downard that he be furnished

with a contractor's surety bond, and that pursuant to this demand the Bond was mailed to him sometime in August, shortly after the construction contract was signed and the job began. This bond, Plaintiffs' Exhibit B, specifically names Claris E. Johnson as the Obligee and recites that the Principal Downard has executed and entered into a certain contract "*with said Obligee*" for the construction of the restaurant. Johnson, apparently an experienced businessman, never took any exception to this recital in the Bond, but instead of turning over the agreed amount of money to Taco Siesta, proceeded personally to make all progress payments to Downard and the sub-contractors and materialmen out of the funds furnished by the appellants Johnson and Clark. The uncontradicted testimony of both Downard and Johnson is to the effect that Johnson never told Downard that he should deal with Taco Siesta rather than with Johnson as the contracting owner, but personally paid to Downard and/or the sub-contractors all of the sums of money due under the construction contract, and controlled the same, paying on every occasion with checks either personally signed by Johnson as maker, or made by the lending bank to Johnson and Clark and endorsed by them and delivered to Downard or the sub-contractors.

So far as the appellants' contention that there is no evidence that Johnson knew that the contract had been executed by Wilkins for Johnson, the statement made in the brief is just completely unjustified in view of the

record, and particularly in view of the fact that the contractor's Bond, Exhibit B, received by Johnson, recites that Johnson is a party to the contract. Johnson is clearly charged, as a matter of law, with notice of the contents of the Bond demanded by and furnished to him. He had the means and the opportunity in his hands to establish this fact, and Bennetts were certainly not charged with any notice to the contrary.

It is the established and unvarying rule of this Honorable Court, under the Constitution of Utah relating to jury trials, that the reviewing Appellate Court will not disturb a jury verdict so long as there is any evidence from which, together with fair inferences that may be drawn therefrom, reasonable minds could conclude as the jury did. See

Gordon v. *Provo City*, 15 Ut. 2nd 287, 391 Pac. 2nd 430;

Brunson v. *Strong*, 17 Ut. 2nd 364, 412 Pac. 2nd 451; and

In Re Estate of Hubbard, 30 Ut. 2nd 260, 516 Pac. 2nd 741.

POINT VI.

THE COURT COMMITTED NO ERROR BY ADVISING THE JURY OF THE NATURE OF THE BOND, PLAINTIFFS' EXHIBIT B, AND COMMENTING THAT THE BONDING COMPANY "INSOFAR AS THE COURT IS AWARE" WILL STAND ANY LOSS MR.

JOHNSON TAKES "MERELY BECAUSE HE IS A LANDOWNER." THE CLAIMED ERROR, IF ANY, IS HARMLESS.

The Surety Bond, Plaintiffs' Exhibit B, was stipulated to be the original of the Bond furnished by Mr. Downard in connection with the job, as the Bond was furnished to the Johnsons and the Clarks, and was received in evidence on that stipulation. (R. 245.) The one provision of the Bond which was specifically read to the jury and emphasized was the last paragraph on Page 1 containing the proviso that in no event shall the surety company be subject to any suit action or other proceeding thereto that is instituted later than 1 year after date of completion, which was March 11. (R. 246.) The Bond was in the jury's possession and available for review during the jury's deliberations. The record shows that after the court made its comment on the Bond and counsel for appellants objected, the court then gave the following further instruction to the jury relating to the matter:

> You must understand that the question that is going to be put to you regarding — so that parties understand it before they rest completely on the evidence, — the issue will be between the plaintiff and the defendants and Johnson insofar as direct recovery of Bennetts against Johnson *will depend upon whether or not Bennetts had reasonable access when asked for the Bond. If they had reasonable access to the Bond then they cannot go against Johnson as far as*

this situation is concerned, but if they did, if Johnson did not make the Bond reasonably available to them . . . then he is not protected by the statute and then he is liable. (R. 302-303.) (Emphasis Supplied.)

Then, the case *was not* submitted for a general verdict, but was submitted on a special interrogatory as to whether or not is was proven that Bennetts made demand on Johnson to exhibit the Bond and that they did not reasonably comply.

In the light of the court's immediate comment upon the true nature of the issue of fact, and in view of the nature of the special interrogatory submitted to the jury for its verdict, it cannot be presumed, or assumed, that the jury's special verdict was compelled or influenced by the fact that the judge said that "so far as he is aware" Johnson might have recourse against the bonding company for any loss sustained because he was a landowner. The court's supplementary comment and instruction made it abundantly clear that the jury was concerned only with the evidence as to the demand for access to the Bond and the response thereto.

Furthermore, the provision in the Bond limiting time for maintaining an action thereon was specifically called to the jury's attention and read to the jury when the Bond was introduced, and was again called the jury's attention by the nature of the objection made by appellants' counsel that "because of the passage of time the bonding company may say its not responsible and

that Mr. Johnson would have to file and pass along such claims within a certain time," and this was followed immediately by the court's further instruction that the jury would be concerned only with the determination, on the evidence, of whether or not the Bennetts had reasonable access when they asked for the Bond. (R. 302.)

Finally the court in its formal instructions carefully and correctly instructed the jury as to the issue to be decided with respect to the demand for and failure to exhibit the Bond, that the burden thereof was on the plaintiffs to prove the demond and the failure, and the customary instructions that the case must be decided solely upon the evidence received. The court further gave the standard instruction to the effect that if the court had done anything which suggested that it is inclined to favor the claim or position of either party the jury would not permit itself to be influenced by any such suggestion. (Court's Instruction, R. 151, 152, 155, 158 and 159.)

And finally, it is respectfully submitted that it is clear under all of the circumstances that even if it should be considered that the court, in making the comment on the Bond complained of, committed a technical error, it was harmless and could not affect the ultimate, proper outcome of the trial in favor of the plaintiffs Bennett.

First, it should be noted that Johnson at all material times had possession of the Bond and is charged with notice of its contents. From his own testimony it is apparent that he knew, long before the 1 year special

limitation elapsed, that Bennetts were asserting and pursuing a claim against him personally. If he failed to present his claim, it was due to his own neglect and failure to attend to his business as a reasonable, prudent business man. He cannot justly, equitably, or legally gain any advantage from his own neglect and default, as suggested by the argument of appellants' counsel. And as a party to the Bond he cannot be heard to deny knowledge of its contents. Indeed, in fairness to him and his counsel, it cannot be said that they do claim ignorance of the provisions of the Bond.

Lastly, and even more important, as hereinabove demonstrated under Points I and II of this brief, Bennetts were entitled to judgment against the Johnsons and the Clarks because the Bond furnished was legally insufficient as a matter of law, irrespective of whether or not demand for the exhibit of the Bond had been made and refused. In view of the form of the Bond and the conduct of the defendant Johnson, which is undisputed, the Bond was insufficient under the statute, so that issue settled by the jury becomes irrelevant, immaterial and unnecessary to the proper decision of the case in favor of the Bennetts.

For these reasons, the court's error in discussing the Bond with the jury, if any, was immaterial and harmless, and need not, and should not be considered in connection with the proper disposition of this appeal under the undisputed facts and the law. There is no reasonable likelihood that injustice has, in the end, resulted. In this

connection, see *Lamb* v. *Bangart*, Ut., 525 Pac. 2nd 602, Headnote 14.

The lower court's comments do not constitute reversible error.

CONCLUSION

For the reasons given, it is respectfully submitted that the judgment of the court below in favor of the Bennetts and against the appellants Johnson and Clark should be affirmed.

Respectfully submitted,

PAUL THATCHER
of YOUNG, THATCHER
& GLASMANN

and

JOSEPH S. NELSON

Attorneys for Plaintiffs-Respondents Bennett