

*Pls to Ex 13*

REYNOLDS BROTHERS LUMBER COMPANY, INC., a corpora- tion,	:	IN THE CIRCUIT COURT OF
	:	
Plaintiff,	:	BALDWIN COUNTY, ALABAMA
	:	
v.	:	AT LAW
	:	
W. S. NEWELL CONSTRUCTION CO.,	:	
W. S. NEWELL, INC., and THE	:	
TRAVELERS INDEMNITY COMPANY,	:	
a corporation,	:	
	:	
Defendants.	:	CASE NO. 7256
	:	

ANSWERS TO INTERROGATORIES

Comes now the defendant, W. S. Newell Construction Com-  
pany, and, for answer to the interrogatories propounded by  
the plaintiff, says the following:

1. W. S. Newell Construction Company, Route 6, Box 186,  
Montgomery, Alabama.
2. Individual.
5. W. S. Newell, Route 6, Box 186, Montgomery, Alabama.
8. No.
9. Not during the entire period from August 3, 1964  
to the date of the filing of this action, November 14, 1966.  
Business was done during a part of that time.
10. This contract was entered into on or about the date  
specified.
12. Yes.
14. Contract complete. Final payment not made.
19. No.

Upon advice of counsel, the undersigned objects separately and severally to each interrogatory not previously answered upon the separate and several grounds that the same calls for hearsay; is immaterial, is irrelevant; calls for the production of written matter not authorized by the laws of the State of Alabama applicable to the propounding of interrogatories; constitutes a fishing expedition; calls for a conclusion of the witness; calls for written matter not required by the court to be attached to these answers and calls for matter of which the witness has no personal knowledge.

W. S. NEWELL CONSTRUCTION COMPANY

By

W. S. Newell

STATE OF ALABAMA:

COUNTY OF Montgomery :

Before me, the undersigned Notary Public in and for said County in said State, personally appeared W. S. Newell, who, being by me first duly sworn, on oath doth depose and say that the foregoing answers are true and correct to the best of his knowledge and belief.

Henry Etta Willis

Sworn to and subscribed before me on this,

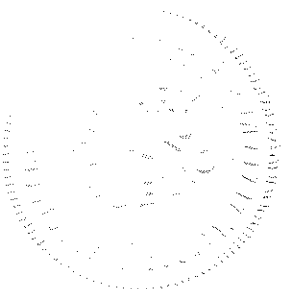
the 6<sup>th</sup> day of February, 1967.

Henry Etta Willis  
Notary Public Montgomery County, Alabama

FILED

FEB 15 1967

ALICE J. DICK, CLERK  
REGISTER



CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing answers to interrogatories upon Norborne Stone, Esq., Attorney for the Plaintiff, by depositing a copy of the same in the United States mail, postage prepaid, addressed to Mr. Stone at his office in Bay Minette, Alabama, on this, the 18th day of February, 1967.

Paul W. Brock  
Paul W. Brock

HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON  
LAWYERS

FIRST NATIONAL BANK BUILDING

MOBILE, ALABAMA

36601

MAILING ADDRESS:  
P. O. BOX 123

CABLE ADDRESS:  
HAB

TELEPHONE:  
432-5511  
AREA CODE 205

CHAS. C. HAND  
C. B. ARENDALL, JR.  
T. MASSEY BEDSOLE  
THOMAS G. GREAVES, JR.  
WM. BREVARD HAND  
VIVIAN G. JOHNSTON, JR.  
PAUL W. BROCK  
ALEX F. LANKFORD, III  
EDMUND R. CANNON  
LYMAN F. HOLLAND, JR.  
J. THOMAS HINES, JR.  
DONALD F. PIERCE  
LOUIS E. BRASWELL  
HAROLD D. PARKMAN  
G. PORTER BROCK, JR.  
HARWELL E. COALE, JR.  
STEPHEN G. CRAWFORD  
JERRY A. MCDOWELL  
W. RAMSEY MCKINNEY, JR.  
LARRY U. SIMS  
C. WAYNE LOUDERMILCH

August 9, 1967

Honorable Alice Duck, Clerk  
Circuit Court of Baldwin County  
County Courthouse  
Bay Minette, Alabama

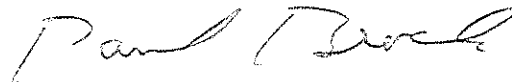
Re: Reynolds Bros. Lumber Co., Inc.  
v. W. S. Newell Construction Co.,  
et al., Case No. 7256

Dear Mrs. Duck:

Enclosed herewith are the originals of the answers  
of Travelers Indemnity Company, one of the defendants,  
to the interrogatories propounded by the plaintiff.  
I am sending a copy of these answers, also executed,  
to Norborne Stone, Esq., attorney for the plaintiff,  
with a copy of this letter.

With best regards,

Yours very truly,



For the Firm

PB.pd  
Encs.

cc: Norborne Stone, Esq.  
J. B. Blackburn, Esq.

REYNOLDS BROTHERS LUMBER	:	IN THE CIRCUIT COURT OF
COMPANY, INC., a corpora-	:	
tion,	:	BALDWIN COUNTY, ALABAMA
Plaintiff,	:	
v.	:	AT LAW
W. S. NEWELL CONSTRUCTION	:	
CO., W. S. NEWELL, INC.	:	
and THE TRAVELERS INDEMNITY	:	
COMPANY, a corporation,	:	
Defendants.	:	CASE NO. 7256
	:	

A N S W E R

Comes now each of the defendants in the above cause, separately and severally, and, for answer to the complaint as a whole and to each count thereof, separately and severally, files the following separate and several pleas:

1. Not guilty.
2. The allegations of said count are untrue.
3. This defendant, for answer to said count, saith that defendant has paid the debt for the recovery of which this suit was brought, before the action was commenced.
4. In mitigation, this defendant, for answer to said count, saith that defendant has paid the debt for the recovery of which this suit was brought, with the exception of \$1,343.00, before the action was commenced.
5. In mitigation, this defendant alleges that the demand of the plaintiff arises from the sale of construction materials to Burke and Cooper Construction Company (called Burke and Cooper), a subcontractor of W. S. Newell, Inc., during, to-wit, the period of time between February 26,

1966, and June 22, 1966, inclusive; that the amount of said demand for said construction materials was in dispute between plaintiff and said Burke and Cooper and that on or about, to-wit, the respective dates below indicated, said Burke and Cooper did deliver to plaintiffs its checks drawn on the American National Bank and Trust Company, Mobile, Alabama, payable to the plaintiff or its order as follows:

March 8, 1966, \$105.24;  
April 8, 1966, \$10,928.02;  
May 17, 1966, \$9,802.52;  
June 21, 1966, \$15,891.19;  
August 3, 1966, \$1,343.00.

Each of said checks was delivered in payment of, and bore upon its face a notation indicating that it was in payment of, said construction materials, to-wit, concrete, made the basis of plaintiff's suit and sold to Burke and Cooper prior to the delivery of each of said checks, respectively. Said checks are herewith incorporated by reference, attached hereto and made a part hereof. The plaintiff received all of said checks, deposited all of them to its account and did receive credit for the money therefor prior to the time of bringing this action, with the exception of that last check dated August 3, 1966, in the amount of \$1,343.00.

WHEREFORE, Defendant says that the demand of the plaintiff has been satisfied except as to said sum of \$1,343.00, for which defendant has already delivered to plaintiff its said check of August 3, 1966.

6. In mitigation, this defendant alleges that the demand of the plaintiff arises from the sale of construction materials to Burke and Cooper Construction Company (called Burke and Cooper), a subcontractor of W. S. Newell, Inc., during, to-wit, the period of time between February 26, 1966, and June 22, 1966, inclusive; that the amount of said demand for said construction materials was in dispute between plaintiff and said Burke and Cooper and that on or about, to-wit, the respective dates below indicated, said Burke and Cooper did deliver to plaintiffs its checks drawn on the American National Bank and Trust Company, Mobile, Alabama, payable to the plaintiff or its order as follows:

March 8, 1966, \$105.24;

April 8, 1966, \$10,928.02;

May 17, 1966, \$9,802.52;

June 21, 1966, \$15,891.19;

August 3, 1966, \$1,343.00.

Each of said checks was delivered in payment of, and bore upon its face a notation indicating that it was in payment of, said construction materials, to-wit, concrete, made the basis of plaintiff's suit and sold to Burke and Cooper prior to the delivery of each of said checks, respectively. Said checks are herewith incorporated by reference, attached hereto and made a part hereof. The plaintiff received all of said checks, and, in consideration of the delivery of the first four of said checks dated, respectively, March 8, 1966; April 8, 1966; May 17, 1966, and June 21, 1966, plaintiff executed four receipts having the effect of

releases by endorsing each of said four checks on its back and by collecting each of said checks, all prior to the filing of this suit.

WHEREFORE, defendant says that the demand of the plaintiff has been satisfied except as to said sum of \$1,343.00, for which defendant has already delivered to plaintiff its said check of August 3, 1966.

7. Plaintiff ought not be admitted to plead the allegations of said count in that on or about, to-wit, August 12, 1964, plaintiff gave to Burke and Cooper Construction Company (called Burke and Cooper), a written bid for concrete to be used on said Federal Aid Interstate Project No. I-10-1 (18) 54 at the price of \$15.40 per cubic yard for Class A and for Class A with additive and \$14.40 per cubic yard for Class B, which prices are customary and standard for said project. Attached hereto, incorporated by reference and made a part hereof is a true copy of said written bid. After accepting said bid and in reliance thereon, Burke and Cooper entered into a contract with defendant W. S. Newell, Inc., to do certain concrete work on said Federal Aid Interstate Project No. I-10-1 (18) 54, upon which said W. S. Newell, Inc. was one of the general contractors. Pursuant to the agreement between them and as Burke and Cooper progressed with said concrete work, plaintiff sold to Burke and Cooper concrete of the types and at the respective prices specified in said bid at various intervals from, to-wit, October or November of 1964 until, to-wit, the first part of April,



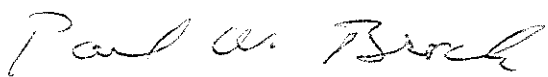
1966.

During most of this same period of time, Burke and Cooper was also purchasing concrete for use on the same project and at the same prices from S&H Concrete, Inc. (called S&H), which had erected a concrete plant near the job site. In the latter part of 1965, S&H dismantled its plant and thereafter had no facilities from which it could sell and deliver concrete to Burke and Cooper for use on said project. Thereafter, Burke and Cooper purchased substantially all of its concrete used on said project from plaintiff, as has been above described, and paid for the same at the prices agreed upon and described in said bid. However, in the early part of April, 1966, after S&H had dismantled its plant and after Burke and Cooper had sent to plaintiff its check of April 8, 1966 (hereinafter described), plaintiff contacted Burke and Cooper and stated that it was going to increase the price of said concrete by \$3.00 per cubic yard for each class. Burke and Cooper was then in the midst of heavy pouring of said concrete, was relying upon plaintiff to deliver its concrete as agreed, had lost its other source of concrete, S&H, all of which Burke and Cooper advised plaintiff or which plaintiff already knew, and objected strenuously to plaintiff's attempt to breach its agreement, and Burke and Cooper therefore advised plaintiff that it was to continue delivering said concrete pursuant to its said agreement. Plaintiff did thereafter continue to deliver said concrete to Burke and Cooper and continued to receive the checks below described, all calculated on the bid prices, all of which checks, with the sole exception of the last check issued by Burke and

Cooper dated August 3, 1966, in the amount of \$1,343.00, were deposited by plaintiff to its account and for which it received credit therefor, all prior to the filing of this suit.


All of said concrete delivered by plaintiff was paid for by Burke and Cooper at the respective bid prices by means of the originals of those checks previously described and attached as exhibits to Plea 5 hereof, which said checks are herewith incorporated by reference and made a part hereof, and also by means of those three checks drawn by Burke and Cooper on its account in the American National Bank and Trust Company, Mobile, Alabama, in favor of plaintiff or its order, which checks are further respectively described as follows: Check dated November 13, 1964, in the amount of \$2,986.97; check dated November 15, 1965, in the amount of \$2,797.53 and check dated December 20, 1965, in the amount of \$2,165.54. Each of said checks bore an appropriate notation on its face indicating that it was in payment of the concrete previously delivered during the period covered by said check. True copies of said checks are herewith incorporated by reference, attached hereto and made a part hereof.

Burke and Cooper has therefore relied to its prejudice upon the aforesaid conduct of plaintiff, and, hence, plaintiff is estopped from claiming any amount greater than said \$1,343.00, represented by the check of Burke and Cooper of August 3, 1966, and delivered to plaintiff on or about that date.

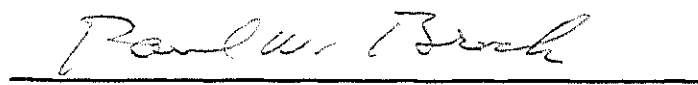
  
\_\_\_\_\_  
Paul W. Brock

Of Counsel:

HAND, ARENDALL, BEDSOLE,  
GREAVES & JOHNSTON


  
J. B. Blackburn  
Attorneys for Each of Said Defendants

Each of said defendants respectfully demands trial of  
this cause by jury.

  
Paul W. Brock

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct  
copy of the foregoing Answer to Norborne C. Stone, Jr., Esq.,  
Attorney for Plaintiff, by depositing same in the United  
States mail, postage prepaid, addressed to said attorney at  
his office in Bay Minette, Alabama, on this, the 31<sup>st</sup> day of  
May, 1967.

  
Paul W. Brock

FILED  
MAY 31 1967  
ALICE L. BUCK, CLERK  
REGISTER

BURKE & COOPER  
CONSTRUCTION COMPANY  
1807 DUNCAN STREET  
MOBILE, ALABAMA 36606

488

DATE MAR 8 1966

61-35  
651

PAY  
TO THE  
ORDER OF

Reynolds Brothers Lumber Co., Inc.

\$105.<sup>24</sup>

BURKE & COOPER  
CONSTRUCTION CO. 105 DOLLARS & CTS

DOLLARS

CRICHTON OFFICE  
AMERICAN NATIONAL BANK  
& TRUST COMPANY  
MOBILE, ALABAMA

FOR B-2863 - 5 1/2 yds - I-10-1 (18) 54

0651 0035

47 032 50

0000010524

681 yds. Cl. B  
57 1/8 yds. Cl. A.

BURKE & COOPER  
CONSTRUCTION COMPANY  
1807 DUNCAN STREET  
MOBILE, ALABAMA 36606

N. P.  
61-506

672

63-35  
631

DATE 8 Apr 1966

PAY  
TO THE  
ORDER OF

Reynolds Brothers Lumber Co. Inc.

\$10,928.<sup>02</sup>

BURKE & COOPER  
CONSTRUCTION CO. 10928 DOLLARS & CTS

DOLLARS

CRICHTON OFFICE  
AMERICAN NATIONAL BANK  
& TRUST COMPANY  
MOBILE, ALABAMA

FOR I-10-1 (18) 54 "A" March concrete

0651 0035

47 032 50

0001092802

BURKE & COOPER  
CONSTRUCTION COMPANY  
1807 DUNCAN STREET  
MOBILE, ALABAMA 36606

N. P.  
61-506

880

63-35  
631

DATE 17 May 1966

PAY  
TO THE  
ORDER OF

Reynolds Brothers Lumber Co.

\$9802.<sup>52</sup>

BURKE & COOPER  
CONSTRUCTION CO. 9802 DOLLARS & CTS

DOLLARS

CRICHTON OFFICE  
AMERICAN NATIONAL BANK  
& TRUST COMPANY  
MOBILE, ALABAMA

FOR I-10-1 (18) 54 - Concrete used through  
21 April 66

0651 0035

47 032 50

0000980252

For Deposit  
Pay To The Order Of  
State Bank of Elberta, Elberta, Ala.  
Reynolds Brothers Lumber Co., Inc.  
Foley, Alabama

PAY ANY BANK, P.E.G.

MAY 19 1966

SOUTH BALDWIN BANK, FOLEY, ALA.

MAY 19 1966

MERCHANTS NATIONAL BANK  
MOBILE

61506

61506  
6/12/12  
6/12/12  
6/12/12

For Deposit  
Pay To The Order Of  
State Bank of Elberta, Elberta, Ala.  
Reynolds Brothers Lumber Co., Inc.  
Foley, Alabama

PAY ANY BANK, P.E.G.

MAY 19 1966

SOUTH BALDWIN BANK, FOLEY, ALA.

MAY 19 1966

MERCHANTS NATIONAL BANK  
MOBILE

61506

61506  
6/12/12  
6/12/12  
6/12/12

For Deposit  
Pay To The Order Of  
State Bank of Elberta, Elberta, Ala.  
Reynolds Brothers Lumber Co., Inc.  
Foley, Alabama

PAY ANY BANK, P.E.G.

MAY 20 1966

SOUTH BALDWIN BANK, FOLEY, ALA.

MAY 21 1966

MERCHANTS NATIONAL BANK  
MOBILE

61506

61506  
6/12/12  
6/12/12  
6/12/12

BURKE & COOPER  
CONSTRUCTION COMPANY

1807 DUNCAN STREET  
MOBILE, ALABAMA 36606

1030

63-35  
631

DATE 21 June 1966

PAY  
TO THE  
ORDER OF

Reynolds Brothers Lumber Co., Inc. \$15891.19

BURKE & COOPER  
CONSTRUCTION CO. 15 891 19 CTS

DOLLARS

CRICHTON OFFICE  
AMERICAN NATIONAL BANK  
& TRUST COMPANY  
MOBILE, ALABAMA

FOR April 22 through May 31 concrete

I-10-1(18)54 - Baldwin

>0651000351<

47 032 50

0001589119

BURKE & COOPER  
CONSTRUCTION COMPANY

1807 DUNCAN STREET  
MOBILE, ALABAMA 36606

1186

61-35  
651

DATE AUG 3 1966

PAY  
TO THE  
ORDER OF

Reynolds Brothers Lumber Co., Inc. \$1343.<sup>00</sup>

BURKE & COOPER  
CONSTRUCTION CO. 13 43 00 CTS

DOLLARS

AMERICAN NATIONAL BANK  
& TRUST COMPANY  
MOBILE, ALABAMA

FOR Concrete 8/1/66 - 8/22/66 I-10-1(18)54

Baldwin Co

>0651000351<

47 032 50

2147  
6912112  
X Dept. Cit #12

PAY ANY BANK, P.E.C.

JUN 24 '66

SOUTH BALDWIN BANK, FOLEY, ALA.

JUN 25 '66 898188

STATE BANK, ELBERTA, ALA.

MERCHANTS NATIONAL BANK

MOBILE ALABAMA

For Deposit  
Pay to the Order of  
State Bank of Elberta, Elberta, Ala.  
Reynolds Brothers Lumber Co., Inc.  
Foley, Alabama

BURKE & COOPER  
CONSTRUCTION COMPANY  
1807 DUNCAN STREET  
MOBILE, ALABAMA 36606

N. P.  
61-506

5799

61-35  
651

DATE 13 Nov 1964

PAY  
TO THE  
ORDER OF

Reynolds Brothers Lumber Co., Inc.

\$2,986.<sup>97</sup>/<sub>100</sub>

BURKE & COOPER  
CONSTRUCTION CO. 2 986 DOLLARS 97 CTS

CRICHTON OFFICE  
AMERICAN NATIONAL BANK  
& TRUST COMPANY  
MOBILE, ALABAMA

BURKE & COOPER CONSTRUCTION CO.

DOLLARS

FOR 186 1/2 c.y. Concrete

I-10-1(18)S4

AMERICAN NATIONAL BANK  
MOBILE, ALABAMA

J. W. Burke

BURKE & COOPER  
CONSTRUCTION COMPANY  
1807 DUNCAN STREET  
MOBILE, ALABAMA 36606

N. P.  
61-506

9986

61-35  
651

DATE 15 Nov 1965

PAY  
TO THE  
ORDER OF

Reynolds Brothers Lumber Co., Inc.

\$2,797.<sup>53</sup>/<sub>100</sub>

BURKE & COOPER  
CONSTRUCTION CO. 2 797 DOLLARS 53 CTS

CRICHTON OFFICE  
AMERICAN NATIONAL BANK  
& TRUST COMPANY  
MOBILE, ALABAMA

DOLLARS

FOR Sept concrete - Oct 13<sup>th</sup>

I-10-1(18)S4 "A"

AMERICAN NATIONAL BANK  
MOBILE, ALABAMA

J. W. Burke

BURKE & COOPER  
CONSTRUCTION COMPANY  
1807 DUNCAN STREET  
MOBILE, ALABAMA 36606

N. P.  
61-506

087

61-35  
651

DATE Dec 20 1965

PAY  
TO THE  
ORDER OF

Reynolds Brothers Lumber Co., Inc.

\$2,165.<sup>54</sup>/<sub>100</sub>

BURKE & COOPER  
CONSTRUCTION CO. 2 165 DOLLARS 54 CTS

CRICHTON OFFICE  
AMERICAN NATIONAL BANK  
& TRUST COMPANY  
MOBILE, ALABAMA

DOLLARS

FOR 140 3/4 yds concrete

I-10-1(18)S4

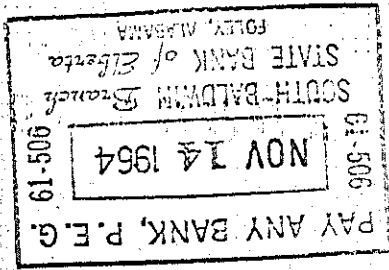
Oct - Nov 65

AMERICAN NATIONAL BANK  
MOBILE, ALABAMA

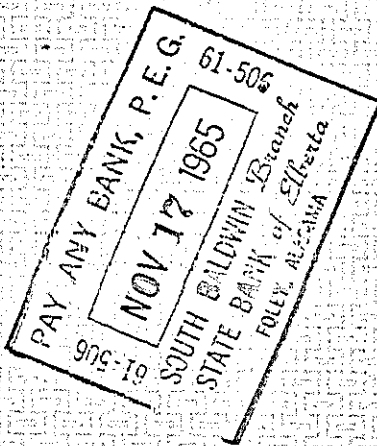
J. W. Burke



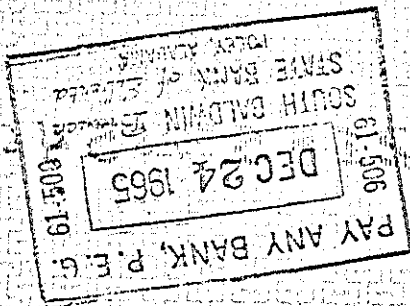
For Deposit  
Pay To The Order Of  
State Bank of Elberta, Elberta, Ala.  
Reynolds Brothers Lumber Co., Inc.  
Foley, Alabama



For Deposit  
Pay To The Order Of  
State Bank of Elberta, Elberta, Ala.  
Reynolds Brothers Lumber Co., Inc.  
Foley, Alabama



For Deposit  
Pay To The Order Of  
State Bank of Elberta, Elberta, Ala.  
Reynolds Brothers Lumber Co., Inc.



6912112  
8# x 3 3/4" x 8"

6912112  
8# x 3 3/4" x 8"

6912112  
8# x 3 3/4" x 8"

WARREN PAINTS  
1322 COLORS

REYNOLDS, PRESIDENT

JOHNS-MANVILLE  
FLOOR TILE & ROOFING  
AND OTHER PRODUCTS



ALUMINUM AWNINGS & WINDOWS  
PLASTIC FOLDING DOORS  
CREOSOTE POLES & POST  
WOLMANIZED TREATED LUMBER



PLUMBING  
SUPPLIES

MOST COMPLETE LINE OF  
BUILDING MATERIALS IN SOUTH

COLEMAN HEATING AND AIR CONDITIONING

BRICK - TILE - HARDWARE  
ELECTRIC SUPPLIES

PANELITE TABLE TOPPING

PLYWOOD

DIGGING MACHINES FOR RENT



## Reynolds Brothers Lumber Co., Inc.

"For Lumber Call Our Number"

TELEPHONE WH 3-7291  
OR WH 3-2985

P. O. BOX 459 - FOLEY, ALABAMA  
WE DELIVER

8-12-64  
July 16, 1964

TO WHOM IT MAY CONCERN:

SUBJECT: FEDERAL AID INTERSTATE PROJECT NO. I-10-1 (18) 54

WE WILL FURNISH CLASS "A" - CLASS "A" w/ADDITIVE AND CLASS "B"  
READY MIX CONCRETE ON FEDERAL AID INTERSTATE PROJECT NO. I-10-1  
(18) 54.

FROM STATION 1382 + 19.250 WEST TO WILCOX ROAD

FOR: CLASS "A" & CLASS "A" w/ ADDITIVE \$ <sup>1540</sup>~~16.25~~ Per Cu. Yard  
CLASS "B" ~~16.25~~ " " "

1440

FROM STATION 1505 + 13.627 EAST TO FLORIDA LINE

CLASS "A" & CLASS "A" w/ADDITIVE <sup>1540</sup>~~17.25~~ Per Cu. Yard  
CLASS "B" ~~16.25~~ " " "

1440

(All the above prices are subject to 4% Sales Tax)  
(Less 2% Cash Discount if paid by 10th of the following month)

"The above prices are quoted with the understanding that the Prime Contractor, or sub-contractor will provide adequate roads to each concrete pour and aid the trucks into the jobs and out."

GOOD LUCK,

1540  
6V  
tot 1602  
32  
Less 2% 1570

REYNOLDS BROS. LUMBER CO., INC.  
By J. P. Reynolds, Pres.

READY MIXED



CONCRETE

MANUFACTURERS OF SEPTIC TANKS - GREASE TRAPS - CONCRETE CULVERTS

No. 7256

THE STATE OF ALABAMA

BALDWIN County.

I, ALICE J. DUCK, Clerk of the Circuit

Court of BALDWIN County, in and for said State and

County, hereby certify that the foregoing pages numbered from one to

\_\_\_\_\_, both inclusive, contain a full, true and complete

transcript of the record and proceedings of said Court in a certain

cause lately therein pending wherein Reynolds Brothers Lumber Company, Inc., a

corporation,

was plaintiff, and W. S. Newell Construction Company et al, were

~~was~~ Defendants, as fully and completely as the same appears of record

in said Court.

And I further certify that the said Reynolds Brothers Lumber Company, Inc., a

did on the 25th day of April, 1968, pray for and obtain

an appeal from the judgment of said Court to the Supreme Court

of Alabama to reverse said judgment of said

Court upon entering into bond with Norborne C. Stone, Jr. and John Earle Chason,

as surety thereon, which said bond has

been approved by me.

Witness my hand and the seal of said Circuit Court of State

BALDWIN County is hereto affixed, this the 25th

day of April, 1968

Clerk of the Circuit Court of

Baldwin

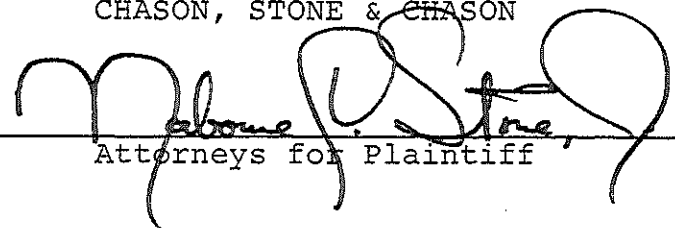
County, Alabama.

REYNOLDS BROTHERS LUMBER	X		
COMPANY, INC., a			
corporation,	X	IN THE CIRCUIT COURT OF	
Plaintiff,	X		
		BALDWIN COUNTY, ALABAMA	
vs.	X		
W. S. NEWELL CONSTRUCTION	X	AT LAW	NO. 7256
COMPANY, et. al.,			
	X		
Defendants.			
	X		

NOTICE OF APPEAL

Comes now the Plaintiff in the above styled cause, by its attorneys and gives notice of appeal to the Supreme Court of Alabama from the judgment of the Circuit Court of Baldwin County, Alabama rendered in the above styled cause and from the order of said Court denying its motion for a new trial entered on the 24th day of April, 1968.

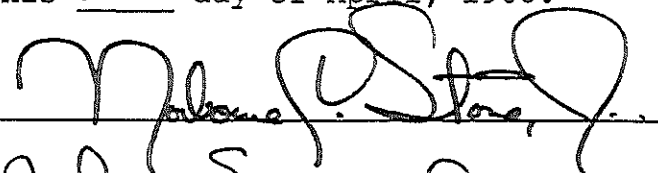
CHASON, STONE & CHASON

By:   
Attorneys for Plaintiff


SECURITY FOR COSTS

We, Norborne C. Stone, Jr. and John Earle Chason, do hereby acknowledge ourselves, separately and severally, as security for the costs of said appeal.

Witness our hands this 25<sup>th</sup> day of April, 1968.

  
John Earle Chason

Taken and approved this 25<sup>th</sup>  
day of April, 1968.

  
Clerk, Circuit Court of Baldwin County, Alabama

THE STATE OF ALABAMA  
Baldwin County - Circuit Court

TO ANY SHERIFF OF THE STATE OF ALABAMA — GREETING:

Whereas, at a Term of the Circuit Court of Baldwin County, held on the first  
Monday in March, 1968, in a cer-  
tain cause in said Court wherein Reynolds Brothers Lumber Company, Inc., a  
corporation, was Plaintiff, and W.S. Newell Construction Company,  
et al., were Defendant, a judgement was rendered ~~against~~ in favor of  
Defendants  
to reverse which judgment, ~~the said~~ and the order dated April 24,  
1968, denying the Plaintiff's motion for a new trial, the Plaintiff  
applied for and obtained from this office an APPEAL, returnable to the next  
Term of our Supreme Court of the State of Alabama, to be held at Montgomery, on  
the 11th day of November, 1968 next, and the necessary ~~bond~~ security  
having been given by the said Plaintiff for costs  
with Norborne C. Stone, Jr., and John Earle Chason, sureties,

Now, You Are Hereby Commanded, without delay, to cite the said W.S. Newell Cons-  
truction Company, W.S. Newell, Inc., and The Travelers Indemnity  
Company, a corporation or J. B. Blackburn

, attorney, to appear at the November Term of our  
said Supreme Court, to defend against the said Appeal, if they think proper.

Witness, ALICE J. DUCK, Clerk of the Circuit Court of said County, this 25th  
day of April, A. D., 1968.

Attest:

Alice J. Duck, Clerk.

received 1 day of May 1968  
d on 1 day of May 1968  
served a copy of the within Citation in Appeal  
J. B. Blackburn

/ service on \_\_\_\_\_  
TAYLOR WILKINS, Sheriff  
By W. A. Talbert D. S.

TAYLOR WILKINS, SHERIFF OF BALDWIN  
COUNTY, ALABAMA, CLAIM \$1.50 EACH  
FOR SERVING 1 PROCESS(ES) AND  
TRAVEL EXPENSE ON EACH OF \$  
PROCESS(ES) OR A TOTAL OF \$ 1.50

740.7256  
**CIRCUIT COURT**  
**Baldwin County, Alabama**  
Reynolds Brothers Lbr. Co.

Vs. { Citation in Appeal  
W. S. Newell Construction Co.

Issued \_\_\_\_\_ day of \_\_\_\_\_, 1968

to be served on  
Hon J. B. Blackburn

70.7256 *Keynote Insurance Company*  
*vs. W. S. Russell Construction Inc.*

JURY LIST - SPRING SESSION - MARCH 4, 1968

- ~~1. Douglas, Oliver, Brookley Field, Daphne~~
- ~~2. Lucassen, Joe L., Sr., Business Manager, Foley~~
- ~~3. McDrew, Roy C., Auditor, Foley~~
- ~~4. Guthrie, Hershey M., Farmer, Foley~~
- ~~5. Hastings, Donald E., Farmer, Rosinton~~
- ~~6. Frank, Jake, Jr., Farmer, Elberta~~
- ~~7. Reedy, M. J., Postal Clerk, Bay Minette~~
- ~~8. Rider, Billy, Civil Service, Lillian~~
- ~~9. Wink, Ellis, Feed Mill, Silverhill~~
- ~~10. Peterson, L.P., Farmer, Robertsdale~~
- ~~11. Newton, Forrest B., Clerk, Bay Minette~~
- ~~12. Nitteberg, Harry, Carpenter, Robertsdale~~
- ~~13. Stewart, Margaret, Housewife, Magnolia Springs~~
- ~~14. Stimpson, Carl, Clay Products, Fairhope~~
- ~~15. Byrd, Claude, Newport, Bay Minette~~
- ~~16. Clemmons, Scott, Brookley Field, Fairhope~~
- ~~17. Cleverdon, Paul L., Farmer, Summerdale~~
- ~~18. Goleman, John E., Brookley Field, Bay Minette~~
- ~~19. Cox, Ruth G., Stockton~~
- ~~20. Burkell, Fred, Civil Service, Foley~~
- ~~21. Byrd, Carl, Civil Service, Stapleton~~
- ~~22. Knicker, Walter R., Farmer, Fairhope~~
- ~~23. Bateman, Martin K., Bell Telephone, Bay Minette~~
- ~~24. Beck, John, Mechanic, Foley~~
- ~~25. Berglin, Guider S., Widow, Fairhope~~
- ~~26. Brinn, Willis, Farmer, Foley~~
- ~~27. Bryhn, Carl L., Farmer, Elberta~~
- ~~28. Trawick, Cecil, Farmer, Stapleton~~
- ~~29. Trione, Leonard, Real Estate, Daphne~~
- ~~30. Underwood, Vaughn, Farmer, Foley~~
- ~~31. McGowan, Ted, State Employee, Bay Minette~~
- ~~32. Rhodes, Larkin P., Jr., Farmer, Bay Minette~~
- ~~33. Weston, Harold, Clerk, Fairhope~~
- ~~34. Willis, Bruce, Mechanic, Elberta~~
- ~~35. Joyner, J. H., Jr., Grand Hotel, Fairhope~~
- ~~36. Gause, Thomas H., Bacon Mountain Mills, Bay Minette~~
- ~~37. Yonn, Walter M., City of Fairhope, Fairhope~~
- ~~38. Young, Hinton, Jr., Standard Furniture, Bay Minette~~
- ~~39. Brewer, Ben, Farmer, Robertsdale~~
- ~~40. Pierson, Donald, Farmer, Robertsdale~~

40  
 12  
 28  
 12  
 16

P XXXXX XXX

D XXXXX XX

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

Special  
~~October~~ Term, 19 69

1 Div. No. 530

To the Clerk ~~Register~~ of the \_\_\_\_\_ Circuit \_\_\_\_\_ Court,  
\_\_\_\_\_ Baldwin \_\_\_\_\_ County—Greeting:

Whereas, the Record and Proceedings of the \_\_\_\_\_ Circuit \_\_\_\_\_ Court \_\_\_\_\_  
of said county, in a certain cause lately pending in said Court between  
Reynolds Brothers Lumber Company, Inc., a Corp. \_\_\_\_\_, Appellant\_\_\_\_,  
\_\_\_\_\_ and \_\_\_\_\_  
W. S. Newell Construction Company, et al \_\_\_\_\_, Appellee\_\_\_\_,  
wherein by said Court it was considered adversely to said appellant\_\_\_\_, were brought before the  
Supreme Court, by appeal taken, pursuant to law, on behalf of said appellant\_\_\_\_\_:

NOW, IT IS HEREBY CERTIFIED, That upon consideration thereof the Supreme Court, on the  
10th day of July, 19 69, affirmed said cause, in all respects, and  
ordered that appellant, Reynolds Brothers Lumber Company, Inc., a Corporation,

\_\_\_\_\_ and Norborne C. Stone, Jr. and John Earle Chason,

\_\_\_\_\_ sureties for the costs of appeal, pay the costs of appeal in this Court and in the Court below,  
for which costs let execution issue.

~~It is further certified that, it appearing that said parties have waived their rights of exemption  
under the laws of Alabama, it was ordered that execution issue accordingly.~~

Witness, J. O. Sentell, Clerk of the Supreme  
Court of Alabama, this the 10th day  
of July, 19 69.

J. O. Sentell  
Clerk of the Supreme Court of Alabama.



THE SUPREME COURT OF ALABAMA

Special

~~October~~ Term, 19 69

1 Div., No. 530

Reynolds Brothers Lumber

Company, Inc., a Corp.

*Appellant,*

*vs.*

W.S. Newell Construction

Company, et al

*Appellee.*

From Baldwin Circuit Court.

No. 7256

**CERTIFICATE OF  
AFFIRMANCE**

The State of Alabama,

Baldwin County.

} Filed

this 11 day of July 1969

Wing J. Tate

JUL 10 1969

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1969

Reynolds Brothers Lumber Company, Inc., A Corp.

1 Div. 530

v.

W. S. Newell Construction Company, et al

Appeal from Baldwin Circuit Court

HARWOOD, JUSTICE

The plaintiff below, Reynolds Brothers Lumber Company, Inc., brought this action against W. S. Newell Construction Co., W. S. Newell, Inc., and Travelers Indemnity Company for payments allegedly due on concrete mix sold by Reynolds Brothers Lumber Company to Burke and

2. Reynolds v. Newell

Cooper, a sub-contractor of the Newells in the construction of a portion of Interstate Highway I-10 in Baldwin County, Alabama. Attorney's fees were also claimed. Travelers was surety on a performance bond executed by the Newells, and the suit was processed under the provisions of Title 50, Section 16, Code of Alabama 1940.

The complaint contained two counts. Count 1 claimed \$11,719.21. Of this amount \$9,369.21 was for ready mixed concrete furnished the sub-contractor, and the remaining \$2,350.00 was claimed as a reasonable attorney's fee.

The second count is in common count form and claims \$11,719.21 due by account on 16 September 1966.

Demurrers to each count being overruled, the defendants filed seven pleas, the first and second pleas being the general issue. Demurrers were filed to the remaining pleas and were sustained except as to Plea 3, which was a plea of payment, and Plea 7, which set up that the plaintiff was estopped to claim any amount from the defendants greater than \$1,342.00.

Thereupon the plaintiff filed replications which joined issue on the plea of payment, and confessed and avoided the estoppel plea.

Defendants' demurrers to the plaintiff's replications being overruled issue was joined.

No point as to any error in the rulings on any of the pleadings is raised on this appeal.

At the conclusion of the trial the jury returned a

3. Reynolds v. Newell

verdict in the following terms:

"We the jury find for the defendant,  
subject to the final payment of \$1343.00  
to the plaintiff.

Ted McGowin, Foreman."

Judgment for the defendant was entered upon this  
verdict.

Plaintiff's motion for a new trial being overruled,  
an appeal was perfected to this court.

Since the plaintiff is the appellant and occupies  
the same position on this appeal as he did as plaintiff  
in the proceedings below, the parties will be referred to  
as plaintiff and defendant.

The evidence below tends to show that on 24 August  
1964, Burke and Cooper Construction Company entered into  
a contract with Newell on a portion of Interstate Highway  
110 in Baldwin County.

A short time before Burke and Cooper had executed  
the contract with Newell, J. P. Reynolds, President of  
Reynolds Brothers Lumber Company, presented to Jerry Burke  
of Burke and Cooper a written bid to supply ready mix  
concrete for use on the above Interstate construction  
project.

The prices shown in the bid were \$15.40 per cubic  
yard for Class A concrete mix with additive, and \$14.40 per  
cubic yard for Class B concrete mix.

During the early stages of the work on the project

4. Reynolds v. Newell

Burke and Cooper ordered most of their concrete mix from suppliers other than Reynolds though one purchase was made from Reynolds during November 1964.

However, in November 1965, after another supplier had moved out of the area, Reynolds began to regularly supply Burke and Cooper with concrete mix used by them on the project.

Seven separate payments totaling some \$43,178.16 were made by Burke and Cooper to Reynolds for concrete mix during the period 15 November 1965 through 3 August 1966. The last payment on 3 August 1966 was in the amount of \$1,343.00, and Reynolds had not, at the time of the trial, cashed the check representing this payment.

At the trial Mr. Reynolds testified that their price for concrete mix had been raised \$3.00 per cubic yard in February 1966, and that on this basis there was a balance due of \$9,369.21.

Mr. Reynolds further testified that he had informed Jerry Burke of the price change by a phone call and a letter dated 11 April 1966.

In this regard Mr. Jerry Burke testified that in the phone conversation with Mr. Reynolds he stated to him that Burke and Cooper had not agreed to any change in price for the concrete mix and he had told Mr. Reynolds that he expected Reynolds to continue deliveries according to their past agreement. After this conversation Reynolds continued to deliver concrete mix to Burke and Cooper.

5. Reynolds v. Newell

Assignment of Error 1 is to the effect that the lower court erred in overruling plaintiff's objection to the following question propounded by the defendants to their witness Jerry Burke:

"Q. If you took the notation of the faces of checks as to the cubic yardage and the period of time they covered, would that cover all the concrete that Mr. Reynolds sold you in 1966?"

The witness answered, "They were."

The checks in question bore notations that they were either for a certain number of cubic yards of concrete, or were for concrete furnished during a certain period of time.

Plaintiff argues that the question called for an answer invasive of the province of the jury. This was also the ground of the objection to the question.

The question merely called for a shorthand rendition of facts ascertainable by calculations from other facts, and in this light was not objectionable. Sovereign Camp W.O.W. v. Hoomes, 219 Ala. 560, 122 So. 686; Southern States Life Ins. Co. v. Allan, 38 Ala. App. 467, 87 So. 2d 439.

Further, there was no dispute as to amount of concrete furnished. The dispute was as to price to be paid therefor. The question in no way was invasive of the province of the jury on this ultimate issue, and in fact related to uncontradicted facts.

6. Reynolds v. Newell

Assignment of Error 1 is without merit.

Assignments of Error 3 and 4 are properly argued jointly, both relating to the same point. These assignments relate to hypothetical questions propounded by the defendants to two of their witnesses, both experienced in the concrete supply business, as to whether it was an established custom, practice and usage in the ready mix concrete industry, that where a bid is made and concrete furnished over a period of time for a particular project pursuant to such bid, the prices set forth in the bid are to hold firm during the project, or the duration thereof.

The hypothetical questions are quite lengthy, and we see no need to set them out in full. It is plaintiff's contention that its objection to each of the questions was meritorious because of the assumption therein of facts not in evidence, that is, the questions assumed that it was not until 11 April 1966 that Mr. Reynolds mentioned any change in prices of concrete mix.

We note that Mr. Reynolds testified on cross examination that he first mentioned a definite increase in price of concrete mix to Mr. Burke on 11 April 1966. Mr. Burke also testified that the first conversation he had with Mr. Reynolds relative to an increase in the price of concrete mix was on 11 April 1966.

There was therefore evidence supporting the assumption made by the examiner as to 11 April 1966 being the first date on which Mr. Reynolds had mentioned an increase in the

7. Reynolds v. Newell

price for concrete mix.

As set forth in Sovereign Camp W.O.W. v. Davis,  
242 Ala. 235, 5 So. 2d 480:

"An hypothetical question is not objectionable because it omits to hypothesize every fact shown by the evidence, for an examiner of an expert witness may lay as a basis for the opinion invited only those facts in evidence which conform to the theory the examiner would establish, though, of course, such question should incorporate sufficient facts in evidence to fairly justify the formation of an expert opinion on a material issue in the case; the frame and substance of hypothetical questions to expert witnesses being a matter largely committed to the discretion of the trial court."

(Citations omitted.)

We find no merit in Assignments of Error 3 and 4.

Assignment of Error 5 charges error in the denial of plaintiff's motion for a new trial.

Such assignment is a vicarious assignment of error of every adequately stated ground of the motion for a new trial, and any such ground properly brought forth and argued is before us for consideration.



8. Reynolds v. Newell

Under Assignment of Error 5, plaintiff has properly grouped and argued grounds 1 - 7, and 13 of the motion for a new trial. All of the grounds are related and pertain to the same point, i.e., the sufficiency of the verdict to support the judgment for the defendant entered by the court.

Judgments and verdicts cannot be supplemented by mere intendment or by reference to extrinsic facts. However, where the language of judgments, or verdicts can be reasonably interpreted by reference to the pleadings and papers in the case, and the instructions of the court, then on such basis intendments are indulged in favor of judgments. The real question is whether the verdict was hopelessly defective thereby affording no proper basis for a judgment. Ex parte Russell, 204 Ala. 626, 87 So. 227; Penney v. State, 229 Ala. 36, 155 So. 576.

It was clearly admitted in the defendants' pleadings filed below that the defendants owed the plaintiff \$1343.00 for concrete mix; that a check covering this amount had been forwarded to the plaintiff but had not been cashed.

Evidence by both parties below showed the check had been received by the plaintiff but had not been cashed but was in the hands of the plaintiff at the time of trial.

In Thornton v. Lucas, 29 So. 400 (Miss.), suit was on an open account for \$75.45, of which \$29.22 was for merchandise sold by the plaintiff to the defendant, and which liability the defendant admitted. The remainder of the claim grew out of a transaction for lumber which the

9. Reynolds v. Newell

defendant denied. The form of the verdict rendered by the jury was:

"We, the jurors, find for the defendant. Defendant to pay merchandise account; plaintiff to pay costs."

The Mississippi court wrote:

"28 Am. & Enc. Law (1st Ed.) p. 4404, says: 'The form of the verdict seems to be immaterial, so the intention of the jury is sufficiently apparent. Irregularities of expression and technical inaccuracies will alike be disregarded if the verdict, notwithstanding these defects, is intelligible.' It is apparent, we think, what the jury meant. The real contest, and the only contest, made by the evidence, is over the portion of the account relating to the lumber transaction, and as to that the jury found for the defendant. \* \* \* "

The only issue made by the pleadings and the evidence concerned the alleged liability of the defendants for the alleged \$3.00 increase per cubic yard in the price of concrete sold by the plaintiff to the defendants. There was no dispute as to the quantity of concrete sold, nor that defendants had paid for, or had sent a check for, the concrete mix at the prices in the original bid which defendants contended was to remain firm until the highway project was

10. Reynolds v. Newell

completed. The jury found this issue in favor of the defendants. The jury knew the check covering the last amount had been received by the plaintiff, and remained in the plaintiff's hands uncashed.

Read with this background, we think the intent of the jury was clear. By their verdict they released the defendants of all liability except the \$1343.00, for which amount the plaintiff had the uncashed check of the defendants. We conclude the verdict a sufficient basis to support the judgment entered by the court.

Under Assignment of Error 5, counsel for plaintiff has brought forward Ground 9 of the motion for a new trial. Ground 9 pertains to an exception taken to a portion of the oral instructions of the court to the jury.

The exception made by counsel reads:

"I would like to except to the statement whether the plaintiff was bound by its contract to furnish until the project was completed. I don't think your Honor meant to say there was such a contract, but we want to except to that part of the charge as a charge on the effect of the evidence."

In brief counsel for plaintiff states:

" \* \* \* the court stated that 'the plaintiff was bound by its contract.' We hardly see how there can be any question

11. Reynolds v. Newell

but that this is a charge on the effect of the evidence, assumes a disputed fact in issue and invokes the province of the jury."

The statement by the court that "the plaintiff was bound by its contract" appears in that portion of the court's instructions relating to the right of a plaintiff in a case of this nature to recover an attorney's fee.

This portion of the court's instructions reads:

"Now in regard to the Attorney's fee, the law provides a reasonable Attorney's fee and that is contingent on the jury being satisfied that the plaintiff had a legal claim in this case. If you are not reasonably satisfied that Reynolds Lumber Company had the right to raise this price, and have a legitimate right to this \$9,000.00 then, of course, the defendant is under no compulsion, and the law would not require that they pay the Reynolds' Attorney. The law provides that where I have been wronged, then the person that wronged me should pay my Attorney rather than I having to pay it and that is one of the cases where the law does provide for an Attorney's fee. But if you are not reasonably satisfied from the evidence that the Plaintiff had a right to raise the price of concrete, and that the

12. Reynolds v. Newell

Plaintiff was bound by its contract to furnish concrete to Burke & Cooper until Project I-10-1 (18) 54 - until that entire Project was completed, then the Defendant would be under no compulsion to pay the Attorney's fee for the Plaintiff's Attorney."

As read in context it is clear that the portion of the court's instructions excepted to is not a charge upon the effect of the evidence, but was based upon certain facts being established to the satisfaction of the jury.

The contention of the plaintiff under Ground 9 of the motion for a new trial is without merit.

Likewise we find no merit in plaintiff's argument under Ground 10 of the motion for a new trial. This ground asserts error in that portion of the court's oral instructions to which an exception was taken, to the effect that:

"Now in regard to attorney's fee, the law provides a reasonable attorney's fee and that is contingent upon the jury being satisfied that the plaintiff had a legal claim in this case."

We find no error in this portion of the instructions in this proceeding. The sole issue was whether the plaintiff had a valid and legal claim for the alleged \$3.00 per cubic yard increase in the price of the concrete mix. If such claim was without foundation, there was no legal claim therefor, and of course no duty on the part of the defendant to

13. Reynolds v. Newell

pay the same. The jury found this issue in favor of the defendant.

Section 16, Title 50, Code of 1940, provides for payment of attorney's fees to persons having an unpaid claim against contractors, and their sureties, where the contractor performs certain public work for the state, county, or municipal government. The method of processing such claims is set forth in said section. The record fails to disclose such processing in this case, but regardless, it must be deemed implicit in the provision for the allowance of attorney's fees that first there be a valid claim.

Plaintiff next argues that the court erred in denying plaintiff's motion for a new trial in that Ground 1 of the motion asserts error in the action of the court in giving at defendants' request its written Charge 14. Plaintiff contends that this charge is erroneous in that "it states that it is the law in Alabama that custom and usage can prove that a contract has been entered into \* \* \* "

Charge 14 reads:

"I charge you, gentlemen of the jury, that if you are reasonably satisfied from the evidence in this case that the plaintiff gave a written bid for concrete to Burke and Cooper Construction Company at the price of \$14.40 per cubic yard or \$15.40 per cubic yard, depending upon the class of concrete and that this bid was not withdrawn

14. Reynolds v. Newell

prior to the purchase of concrete by Burke and Cooper Construction Company from the plaintiff in accordance with the terms of said bid, and that it was the common practice and usage in the ready mix concrete industry for the prices set forth in any such bid to remain firm while the project was under construction, then the plaintiff was obligated as a matter of law to sell said concrete to Burke and Cooper Construction Company at the prices set forth in said bid."

The charge is based upon the jury being reasonably satisfied of certain facts by the evidence, and then, and only then would the plaintiff be obligated under the contract. It does not state that a contract can be proven by custom and usage.

It is settled by our decisions that custom and usage can not prove that a contract was actually made. City Mortgage and Discount Co. v. Palatine Ins. Co., 226 Ala. 179, 145 So. 490.

However, evidence of custom and usage of a business is admissible to supply a stipulation of the terms of a contract where the contract is silent in that aspect. Such evidence is admissible to show the true meaning and intention of the contract. Kinney v. South & North Alabama R. R. Co., 82 Ala. 368; Johnson-Brown Co. v. Dominey Produce Co., 212 Ala. 377, 102 So. 606; Ham Turpentine Co. v. Mizell, 215 Ala. 143, 110 So. 372; Ison Finance Co. v. Glasgow, 266 Ala. 391, 96 So. 2d 737.

15. Reynolds v. Newell

The court did not err in giving defendants' requested Charge 14.

Finally, plaintiff contends that the court erred in giving at the defendants' request their written Charge 12. Counsel in brief states the charge is defective "because it misleads the jury by stating that 'Burke and Cooper Construction Company accepted the offer,'" and further, "it was up to the jury to determine whether Burke and Cooper had accepted the offer \* \* \* and not for the court to instruct the jury that in fact, such offer had been accepted."

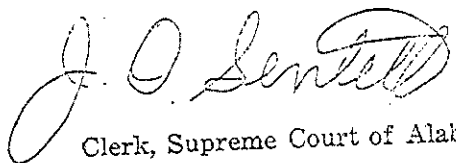
Counsel's argument is faulty in that the charge did not instruct the jury that in fact the offer had been accepted by Burke and Cooper. The fact of acceptance of the offer by Burke and Cooper was hypothesized upon the jury being satisfied of such fact by the evidence.

AFFIRMED.

Livingston, C. J., Lawson and Merrill, J. J., concur.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 10 day of July 1969



Clerk, Supreme Court of Alabama



REYNOLDS BROTHERS LUMBER	:	IN THE CIRCUIT COURT OF
COMPANY, INC., a corpora-	:	BALDWIN COUNTY, ALABAMA
tion,	:	
Plaintiff,	:	AT LAW
v.	:	
W. S. NEWELL CONSTRUCTION	:	
CO., et al.,	:	
Defendants.	:	CASE NO. 7256

AMENDED ANSWER

Comes now each of the defendants in the above cause, separately and severally, and for further answer to the complaint as a whole and to each count thereof, separately and severally, amends ~~Pleas 5 and 7~~ of its answer as previously filed *by adding the following pleas, separately* so that said pleas shall read as follows, *and severally:* respectively: *17-0-75*

5. <sup>A</sup>In partial defense, this defendant alleges that the demand of the plaintiff arises from the sale of construction materials to Burke and Cooper Construction Company (called Burke and Cooper), a subcontractor of W. S. Newell, Inc., during, to-wit, the period of time between February 26, 1966, and June 22, 1966, inclusive; that the amount of said demand for said construction materials was in dispute between plaintiff and said Burke and Cooper and that on or about, to-wit, the respective dates below indicated, said Burke and Cooper did deliver to plaintiffs its checks drawn on the American National Bank and Trust Company, Mobile, Alabama, payable to the plaintiff or its order as follows:

*Filed: March 7, 1968.*

*John J. Maslowski*  
*Judge*

March 8, 1966, \$105.24;  
April 8, 1966, \$10,928.02;  
May 17, 1966, \$9,802.52;  
June 21, 1966, \$15,891.19;  
August 3, 1966, \$1,343.00.

Each of said checks was delivered in payment of, and bore upon its face a notation indicating that it was in payment of, said construction materials, to-wit, concrete, made the basis of plaintiff's suit and sold to Burke and Cooper prior to the delivery of each of said checks, respectively. Said checks (previously attached to the answer first filed herein) are herewith incorporated by reference and made a part hereof. The plaintiff received all of said checks, deposited all of them to its account and did receive credit for the money therefor prior to the time of bringing this action, with the exception of that last check dated August 3, 1966, in the amount of \$1,343.00.

WHEREFORE, defendant says that the demand of the plaintiff has been satisfied except as to said sum of \$1,343.00, for which defendant has already delivered to plaintiff its said check of August 3, 1966.

¶. Plaintiff ought not be admitted to plead the allegations of said count in that on or about, to-wit, August 12, 1964, plaintiff gave to Burke and Cooper Construction Company (called Burke and Cooper), a written bid for concrete to be used on said Federal Aid Interstate Project No. I-10-1 (18) 54 at the price of \$15.40 per cubic yard for Class A and for Class A with additive and \$14.40 per cubic yard for Class B, which prices are customary

and standard for said project. A true copy of said written bid as previously filed herein is incorporated by reference and made a part hereof. In reliance upon said bid, Burke and Cooper entered into a contract with defendant W. S. Newell, Inc., to do certain concrete work on said Federal Aid Interstate Project No. I-10-1 (18) 54, upon which said W. S. Newell, Inc. was one of the general contractors. Pursuant to the agreement between them and as Burke and Cooper progressed with said concrete work, plaintiff sold to Burke and Cooper concrete of the types and at the respective prices specified in said bid at various intervals from, to-wit, October or November of 1964 until, to-wit, the first part of April, 1966.

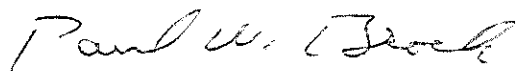
During most of this same period of time, Burke and Cooper was also purchasing concrete for use on the same project and at the same prices from S&H Concrete, Inc. (called S&H), which had erected a concrete plant near the job site. In the latter part of 1965, S&H dismantled its plant and thereafter had no facilities from which it could sell and deliver concrete to Burke and Cooper for use on said project. Thereafter, Burke and Cooper purchased substantially all of its concrete used on said project from plaintiff, as has been above described, and paid for the same at the prices agreed upon and described in said bid. However, in the early part of April, 1966, after S&H had dismantled its plant and after Burke and Cooper had sent to plaintiff its check of April 8, 1966 (hereinafter described), plaintiff contacted Burke and


Cooper and stated that it was going to increase the price of said concrete by \$3.00 per cubic yard for each class. Burke and Cooper was then in the midst of heavy pouring of said concrete, was relying upon plaintiff to deliver its concrete as agreed, had lost its other source of concrete, S&H, all of which Burke and Cooper advised plaintiff or which plaintiff already knew, and objected strenuously to plaintiff's attempt to breach its agreement, and Burke and Cooper therefore advised plaintiff that it was to continue delivering said concrete pursuant to its said agreement. Plaintiff did thereafter continue to deliver said concrete to Burke and Cooper and continued to receive the checks below described, all calculated on the bid prices, all of which checks, with the sole exception of the last check issued by Burke and Cooper dated August 3, 1966, in the amount of \$1,343.00, were deposited by plaintiff to its account and for which it received credit therefor, all prior to the filing of this suit.

All of said concrete delivered by plaintiff was paid for by Burke and Cooper at the respective bid prices by means of the originals of those checks previously described and attached as exhibits to Plea 5 first filed herein, which said checks are herewith incorporated by reference and made a part hereof, and also by means of those three checks drawn by Burke and Cooper on its account in the American National Bank and Trust Company, Mobile, Alabama, in favor of plaintiff or its order, which checks are further respectively described as follows: Check dated

November 13, 1964, in the amount of \$2,986.97; check dated November 15, 1965, in the amount of \$2,797.53 and check dated December 20, 1965, in the amount of \$2,165.54. Each of said checks bore an appropriate notation on its face indicating that it was in payment of the concrete previously delivered during the period covered by said check. True copies of said checks, which have previously been filed herein, are herewith incorporated by reference and made a part hereof.

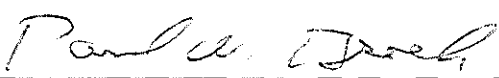
Burke and Cooper has therefore relied to its prejudice upon the aforesaid conduct of plaintiff, and, hence, plaintiff is estopped from claiming any amount greater than said \$1,343.00, represented by the check of Burke and Cooper of August 3, 1966, and delivered to plaintiff on or about that date.

  
\_\_\_\_\_  
Paul W. Brock

  
\_\_\_\_\_  
J. B. Blackburn  
Attorneys for said Defendants

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Answer on Norborne C. Stone, Jr., Esq., attorney for plaintiff, on this, the 7th day of March, 1968.

  
\_\_\_\_\_  
Paul W. Brock

STATE OF ALABAMA

IN THE CIRCUIT COURT - LAW SIDE

BALDWIN COUNTY

TO: ANY SHERIFF OF THE STATE OF ALABAMA:

You are hereby commanded to summon W. S. Newell Construction Co., W. S. Newell, Inc., and The Travelers Indemnity Company, a corporation, to appear within thirty days from the service of this Writ in the Circuit Court to be held for said County at the place of holding same, then and there to answer the complaint of Reynolds Brothers Lumber Company, Inc., a corporation.

Witness my hand this 14 day of November, 1966.

  
Clerk

REYNOLDS BROTHERS LUMBER X  
COMPANY, INC., a corporation, X

IN THE CIRCUIT COURT OF

Plaintiff, X

vs. X

BALDWIN COUNTY, ALABAMA

W. S. NEWELL CONSTRUCTION CO., X  
W. S. NEWELL, INC., and X  
THE TRAVELERS INDEMNITY X  
COMPANY, a corporation, X

AT LAW NUMBER: 7256

Defendants. X

COUNT ONE:

The Plaintiff claims of the Defendants Nine Thousand Three Hundred Sixty-nine Dollars and Twenty-one cents (\$9,369.21) with interest thereon from the 22nd day of June, 1966, for the breach of a bond for payment of labor, materials, feed-stuffs or

supplies, made and entered into by the Defendant, The Travelers Indemnity Company, a corporation organized under the laws of the State of Connecticut, as surety for the Defendants W. S. Newell Construction Co. and W. S. Newell, Inc., as principals, on the 3rd day of August, 1964, payable to the State of Alabama in the sum of One Million Nine Hundred Fifteen Thousand One Hundred and Two and 38/100ths Dollars (\$1,915,102.38), with obligation that the Defendants W. S. Newell Construction Co. and W. S. Newell, Inc., having on that date entered into a contract with the State of Alabama for the building of 12.17 miles of road in Baldwin County, Alabama, known as Federal Aid Interstate Project No. I-10-1(18)54, Prop. "A" from Wilcox Road East to the Florida State Line, should promptly make payment to all persons supplying said Defendants W. S. Newell Construction Co. and W. S. Newell, Inc., with labor, materials, feed-stuff or supplies for or in the prosecution of the Work provided for in said contract and for the payment of reasonable attorney's fees incurred by successful claimants or plaintiffs in suits on said bond.

And the Plaintiff further alleges that the condition of said bond has been broken by said Defendants, W. S. Newell Construction Co. and W. S. Newell, Inc., in that the Plaintiff, during the period of time between February 26, 1966 and June 22, 1966, both dates inclusive, furnished to Burke & Cooper Construction Co., a subcontractor of the Defendants, W. S. Newell Construction Co. and W. S. Newell, Inc., at the request of the said Burke & Cooper Construction Co., work, labor, materials and supplies, viz: ready mixed concrete for use in and about the construction of said road, and the payment for which has not been made. And the Plaintiff further alleges that written notice of the amount due it and the nature of the claim was given to the Defendant, The Travelers

Indemnity Company, on, to-wit: the 16th day of September, 1966, which date is more than forty-five (45) days prior to the commencement of this action. WHEREFORE, the Plaintiff claims of the Defendants damages in the aforesaid sum of Nine Thousand Three Hundred Sixty-nine and 21/100ths Dollars (\$9,369.21) together with interest thereon from June 22, 1966; and the Plaintiff claims of the Defendants the further sum of Two Thousand Three Hundred and Fifty Dollars (\$2,350.00) as a reasonable attorney's fee to be paid it's attorneys for legal services rendered in this cause.

COUNT TWO:

The Plaintiff claims of the Defendants the sum of Eleven Thousand Seven Hundred Nineteen Dollars and Twenty-one cents (\$11,719.21) due from them by account on the 16th day of September, 1966, which sum of money with the interest thereon, is still unpaid.

Respectfully Submitted,

CHASON, STONE & CHASON

By:   
Attorneys for Plaintiff

The Plaintiff respectfully demands  
a trial of this cause by a jury.

CHASON, STONE & CHASON

By:   
Attorneys for Plaintiff

FILED

NOV 14 1966

MADE J. DUCK, CLERK  
REGISTER



733



Sheriff of Montgomery County  
M. S. Butler,

EXECUTED BY SERVING A  
COPY OF THE WITHIN *on*

W.S. Howell Construction Co.

W. S. Jewell & Co.

M. S. BUTLER  
Sheriff Montgomery County

By Tom Landress  
Deputy Sheriff

vs.

Defendants.

\* \* \* \* \*

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

AT LAW NUMBER:

\* \* \* \* \*

## SUMMONS AND BILL OF COMPLAINT

\* \* \* \* \*

16  
 y  
 \*\*\* \*\*  
 The Sheriff claims \$1.00  
 per cent of  
 proceeds or a total of \$ 3 30  
 M. S. Duke, Sheriff  
 Montgomery County  
 Alabama.  
 ATTORNEY  
 P. O.  
 BAY MINE

**CHASON, STONE & CHASON**  
ATTORNEYS AT LAW  
P. O. Box 120  
BAY MINETTE, ALABAMA

We, the Jury find for the Defendant,  
subject to the Final Payment of \$1343<sup>00</sup>  
to the Plaintiff.

Ed Mc Gowan  
German

1  
2  
3

REYNOLDS BROTHERS LUMBER	:	IN THE CIRCUIT COURT OF
COMPANY, INC., a corporation,	:	
	:	
Plaintiff,	:	BALDWIN COUNTY, ALABAMA
	:	
v.	:	AT LAW
	:	
W. S. NEWELL CONSTRUCTION CO.,	:	
et al,	:	
	:	
Defendants.	:	CASE NO. 7256

D E M U R R E R

Comes now each of the defendants in the above cause, separately and severally, and demurs to the complaint filed herein and to each count thereof, separately and severally, and, for separate and several grounds of such demurrer, assigns the following, separately and severally:

1. For that the same fails to state a cause of action against this defendant.

2. For that the same does not allege a compliance with all conditions precedent of said bond.

3. For that the same does not allege a compliance by the plaintiff with all conditions precedent of said bond to the plaintiff's right to maintain this action.

4. For that the full substance and legal effect of said bond is not set forth, nor is it set forth in haec verba.

5. For that it affirmatively appears that the plaintiff did not supply this defendant with labor, materials, feed-stuff or supplies for or in the prosecution of the work described in said contract.

6. For that it affirmatively appears that said ready mixed concrete was not supplied to this defendant, but was supplied to Burke and Cooper Construction Company.

7. For that the allegation that Burke and Cooper Construction Company was a subcontractor of the defendants W. S. Newell Construction Company and W. S. Newell, Inc. constitutes merely the conclusion of the pleader, insufficient facts being alleged in support thereof.

8. For aught appearing, the ready mixed concrete allegedly furnished by this plaintiff was not labor, materials, feed-stuff or supplies as defined in said bond.

9. For aught appearing, said ready mixed concrete was not labor, materials, feed-stuff or supplies used for or in the prosecution of the work described in said bond.

10. For aught appearing, there was no consideration given for said bond.

11. For that the allegations thereof are vague, ambiguous and uncertain in that all of the terms and provisions of said alleged bond are not set forth.

12. For aught appearing, said suit was commenced later than one year from the date of final settlement of said contract.

13. For that there is no allegation that said suit was commenced not later than one year from the date of the final settlement of said contract with the State of Alabama for the building of said road.

14. For that there is no allegation that said written notice was given in the manner and form required by the provisions of Title 50, Section 16, of the Code of Alabama of 1940.

15. For that there is no allegation that said notice was given by registered mail, postage prepaid, addressed to The Travelers Indemnity Company at any of its places of business or offices.

16. For that it affirmatively appears that said written notice did not comply with the statutory requirements of the State of Alabama governing the same.

17. For that the allegation that the further sum of \$2,350.00 constitutes a reasonable attorney's fee constitutes merely the conclusion of the pleader, insufficient facts being alleged in support thereof.

18. For that there is no allegation that said ready mixed concrete was ever used in the construction of said road.

19. For that there is no allegation that said ready mixed concrete was supplied to W. S. Newell Construction Company or to W. S. Newell, Inc. for or in the prosecution of the work provided for in said contract.

20. For aught appearing, Burke and Cooper Construction Company was a subcontractor of said W. S. Newell Construction Company and W. S. Newell, Inc. in connection with work other than said road known as Federal Aid Interstate Project No. I-10-1 (18) 54.

21. For that the same is vague, ambiguous and uncertain.

Paul Brock  
Attorney for each of Said Defendants

Of Counsel:

HAND, ARENDALL, BEDSOLE,  
GREAVES & JOHNSTON

J. B. Blackburn  
J. B. Blackburn

Each of said defendants respectfully demands trial of this  
cause by jury.

J. B. Blackburn  
J. B. Blackburn, Attorney for  
each of Said Defendants

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct  
copy of the foregoing pleading to Norborne C. Stone, Jr.,  
Esq., attorney for plaintiff, by depositing a copy of same in  
the United States Mail, postage prepaid, addressed to said  
attorney at his office in Bay Minette, Alabama on this,  
the 12 day of December, 1966.

Paul Brock

REYNOLDS BROTHERS LUMBER	X	
COMPANY, INC. A Corporation,	X	IN THE CIRCUIT COURT OF
Plaintiff,	X	BALDWIN COUNTY, ALABAMA
vs.	X	AT LAW
W. S. NEWELL CONSTRUCTION	X	CASE NO. 7256
COMPANY, ET. AL.,	X	
Defendants.	X	

DEMURRER TO PLEAS

Comes now the Plaintiff in the above styled cause, by its attorneys, and demurs to pleas 1, 4, 5, 6, and 7, separately and severally, and assigns the following separate and several grounds in support thereof:

1. Said pleas are immaterial.
2. Plea 1 is improper.
3. It affirmatively appears from the allegations of said pleas that the Defendants have not paid the debt for the recovery of which this suit was brought.
4. The allegations of said pleas are conclusions of the pleader and no facts are alleged therein to support such conclusions.
5. The allegations of said pleas are inconsistent.
6. The allegations of plea "5" fail to allege any facts which would constitute a defense to the complaint or either count thereof.
7. Such pleas are insufficient as pleas of accord and satisfaction or as a plea of set-off.
8. Said pleas are insufficient as pleas of accord and satisfaction.
9. Said pleas are insufficient as pleas of set-off.

10. The allegations of said pleas fail to allege any contract between the Plaintiff and Burke and Cooper Construction Company, based upon a valuable consideration under and by the terms of which the Plaintiff agreed to deliver concrete to the said Burke and Cooper Construction Company at the prices set forth in said pleas or for the total amount set forth in said pleas.

11. The allegations of said pleas fail to allege any offer on the part of the Plaintiff to deliver concrete to Burke and Cooper Construction Company and an acceptance of said offer on the part of said Burke and Cooper Construction Company.

12. The allegations of plea "7" that the prices therein set forth "are customary and standard for said project" are a conclusion of the pleader.

13. It affirmatively appears from the allegations of plea "7" that there was no contract or agreement by and between the Plaintiff and Burke and Cooper Construction Company to deliver concrete at the prices set forth in said plea or for the total amount set forth in said plea.

Respectfully submitted,

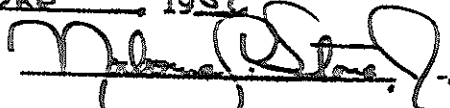
CHASON, STONE & CHASON

By: 

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties to this proceeding, by mailing the same to each by First Class United States Mail, properly addressed and postage prepaid on this 8th day of June, 1967.



FILED  
JUN 8 1967

ALICE A. DICK, CLERK  
REGISTERED

Re-Filed 13-7-68 to Pleas 5A & 48

REYNOLDS BROTHERS LUMBER	:	IN THE CIRCUIT COURT OF
COMPANY, INC., a corpora-	:	BALDWIN COUNTY, ALABAMA
tion,	:	
Plaintiff,	:	AT LAW
v.	:	
W. S. NEWELL CONSTRUCTION	:	
CO., et al.,	:	
Defendants.	:	CASE NO. 7256

DEMURRER TO REPLICATION

Comes now each of the defendants in the above cause and demurs to Replication 2 previously filed herein and, for separate and several grounds of such demurrer, assigns the following, separately and severally:

1. For that the same neither denies nor confesses and avoids Plea 7.
2. For that the same amounts only to a general denial of Plea 7.
3. For that the same fails to confess and avoid the allegations of Plea 7.
4. For that the same makes no allegation not provable under a replication of the general issue.
5. For that the matters alleged therein are mere matters of evidence.
6. For that the same does not confess and avoid the allegations of Plea 7.
7. For that the same is vague, ambiguous and uncertain.



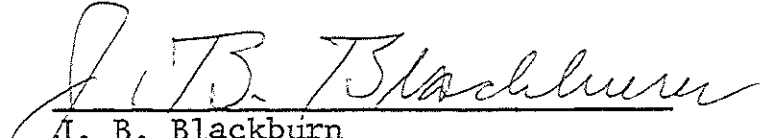
8. For that there is no allegation of any new consideration for any alleged agreement of this defendant to modify its prior agreement with plaintiff.

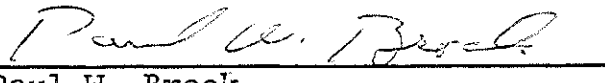
9. For that there is no allegation that there was any new consideration for the alleged agreement of this defendant to pay \$18.40 per cubic yard for Class A and Class A with additives and \$17.40 per cubic yard for Class B concrete plus 4% sales tax and less 2% cash discount, nor is there any allegation that said promise or agreement was in writing.

10. For that it affirmatively appears that said alleged new contract is void for lack of consideration.

11. For that it is alleged that the plaintiff accepted said checks, but did not accept them subject to the conditions set forth thereon, which is contrary to law.

12. For that, as a matter of law, the plaintiff could not accept said checks and, nonetheless, deny the conditions inscribed thereon.

  
J. B. Blackburn

  
Paul W. Brock  
Attorneys for said Defendants

CERTIFICATE OF SERVICE

I hereby certify that I have delivered a true and correct copy of the foregoing Demurrer to Norborne C. Stone, Jr., Esq., attorney for plaintiff, on this, the 7th day of March, 1968.

Paul W. Brock  
Paul W. Brock

Filed 3-7-68  
Circuit Clerk  
clerk

2475 Sep 13-1

REYNOLDS BROTHERS LUMBER : IN THE CIRCUIT COURT OF  
COMPANY, INC., a corpora- :  
tion, :  
Plaintiff, : BALDWIN COUNTY, ALABAMA  
v. : AT LAW  
W. S. NEWELL CONSTRUCTION CO., :  
W. S. NEWELL, INC., and THE :  
TRAVELERS INDEMNITY COMPANY, :  
a corporation, :  
Defendants. : CASE NO. 7256

ANSWERS TO INTERROGATORIES

Comes now the defendant, W. S. Newell, Inc., and, for answer to the interrogatories propounded by the plaintiff, says the following:

1. W. S. Newell, Inc.
2. Corporation.
3. W. S. Newell, Inc.; Alabama; Route 6, Box 186, Hunter Loop Road, Montgomery, Alabama.
6. Yes.
8. No.
9. Not during the entire period from August 3, 1964 to the date of the filing of this action, November 14, 1966. Business was done during a part of that time.
10. Such contract was entered into on or about the date mentioned.
12. Yes.
14. Contract complete. Final payment not made.
19. No.

Upon advice of counsel, the undersigned objects separately and severally to each interrogatory not previously answered upon the separate and several grounds that the same calls for hearsay; is immaterial, is irrelevant; calls for the/production of written matter not authorized by the laws of the State of Alabama applicable to the propounding of interrogatories; constitutes a fishing expedition; calls for a conclusion of the witness; calls for written matter not required by the court to be attached to these answers and calls for matter of which the witness has no personal knowledge.

W. S. NEWELL, INC.

By William S. Newell  
Its President

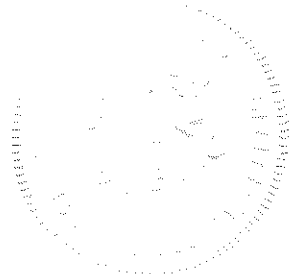
STATE OF ALABAMA:  
COUNTY OF Montgomery :

Before me, the undersigned Notary Public in and for said County in said State, personally appeared W. S. Newell, who, being by me first duly sworn, on oath doth depose and say that he is President for W. S. NEWELL, INC., and that the foregoing answers are true and correct to the best of his knowledge and belief.

Pherry Etta Willis

Sworn to and subscribed before me on  
this, the 6th day of February, 1967.

Pherry Etta Willis  
Notary Public, Montgomery County, Alabama



CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing answers to interrogatories upon Norborne Stone, Esq., Attorney for the Plaintiff, by depositing a copy of the same in the United States mail, postage prepaid, addressed to Mr. Stone at his office in Bay Minette, Alabama, on this, the 14th day of February, 1967.

Paul W. Brock  
Paul W. Brock

FILED  
FEB 14 1967  
ALICE J. PAUL, CLERK  
U.S. DISTRICT COURT

REYNOLDS BROTHERS LUMBER	X	
COMPANY, INC., a corpora-	X	IN THE CIRCUIT COURT OF
tion,		
Plaintiff,	X	BALDWIN COUNTY, ALABAMA
vs.	X	
W. S. NEWELL CONSTRUCTION	X	AT LAW CASE NO. 7256
CO., W. S. NEWELL, INC.		
and THE TRAVELERS INDEMNITY	X	
COMPANY, a corporation,	X	
Defendants.	X	

REPLICATION

Comes now the Plaintiff in the above styled cause, by its attorneys, and in replication to the pleas heretofore filed by the Defendants to the Complaint and to each count thereof, says as follows:

1. The Plaintiff joins issue with plea "3".
2. In replication to plea "7" the Plaintiff alleges that it did, on or about August 12, 1964, submit to Burke and Cooper Construction Company and to other interested persons, firms and corporations, a written proposal in and by the terms of which the Plaintiff agreed to furnish ready mix concrete on federal aid interstate project No. I-10-1 (18) at the prices set forth in the proposal attached to the pleas heretofore filed by the Defendants. That Burke and Cooper Construction Company did not accept the proposal of the Plaintiff but instead purchased concrete for use on said project from S & H Concrete, Inc. and when that company no longer furnished concrete to Burke and Cooper Construction Company, the latter company contacted the Plaintiff and requested that it begin furnishing concrete to Burke and Cooper Construction Company for use in said project. The Plaintiff never agreed to furnish concrete to Burke and Cooper Construction Company at the prices alleged in said plea and the prices quoted by the Plaintiff to Burke and Cooper Construction Company and to other interested

parties were conditioned upon the proposal being accepted, which did not occur, and because the proposal was not accepted, the Plaintiff did not erect a concrete plant at a point adjacent to said project from which he could deliver concrete at the quoted prices. That the Plaintiff informed Burke and Cooper Construction Company on or about April 11, 1966 that it could not and would not deliver concrete to it at the prices set forth in the proposal from the point from which it had to deliver said concrete. That Burke and Cooper Construction Company, on or about said date, informed the Plaintiff that it would pay for said concrete at the rate of \$18.40 per cubic yard for Class "A" and Class "A" with additives and would pay \$17.40 per cubic yard for Class "B" concrete plus 4% sales tax and less 2% cash discount if paid by the tenth of the month following the month of delivery. That the Plaintiff did receive checks from Burke and Cooper in amounts as shows in the plea, but said checks were not accepted by the Plaintiff in full payment of the amount due it for concrete delivered the previous month but they were credited to the account of Burke and Cooper Construction Company on the records of the Plaintiff.

Respectfully submitted,

CHASON, STONE & CHASON

By: Melvin J. Stone, Jr.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties to this proceeding, by mailing the same to each by First Class United States Mail, properly addressed and postage prepaid on this 6 day of March, 1968.

Melvin J. Stone, Jr.

**FILED**

MAR 7 1968

**ALICE J. DUCK**

CLERK  
REGISTER

REYNOLDS BROTHERS LUMBER  
COMPANY, INC., a corporation,

Plaintiff,

vs

W. S. NEWELL CONSTRUCTION CO.,  
W. S. NEWELL, INC., and  
THE TRAVELERS INDEMNITY  
COMPANY, a corporation,

Defendants.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

AT LAW NUMBER: 9256

INTERROGATORIES PROPOUNDED BY THE PLAINTIFF  
TO THE DEFENDANT THE TRAVELERS INDEMNITY  
COMPANY, a corporation.

Comes now the Plaintiff in the above styled cause, by  
it's attorneys, and propound the following interrogatories to the  
Defendant, The Travelers Indemnity Company, a corporation:

1. Please state your correct corporate name.
2. Under the laws of what state were you incorporated  
or chartered?
3. What is the location and address of your principal  
place of business?
4. Please state in what business you are engaged.
5. Were you during the years 1964 through and including  
the date on which the above cause was filed against you doing  
business as described by you in your answer to the last interro-  
gatory in the State of Alabama?
6. If your answer to the last interrogatory was in the  
affirmative, please state whether or not you were doing business  
by agent in Baldwin County, Alabama; and, if so, the names and  
addresses of each such agent.
7. Were you at all times during the months of September,  
October and November, 1966, doing business in Baldwin County,  
Alabama?



8. How long have you done business by agent in Baldwin County, Alabama, continuously immediately prior to the filing of this action against you?

9. Were you during the years 1964, 1965 and the year 1966 up to and including the date on which this suit was filed against you doing business in Montgomery County, Alabama?

10. If your answer to the last interrogatory is in the affirmative please state whether you were doing business in said County by and through Turner Insurance & Bonding Company of 219-221 Bell Building, Montgomery, Alabama, as your agent.

11. If your answer to the last interrogatory is in the affirmative please state whether said Turner Insurance & Bonding Company was your agent at all times during the month of September, 1966.

12. Did you, as surety, execute and deliver to the State of Alabama on August 3, 1964 a bond for payment of labor, materials, feed-stuffs or supplies as required by Title 50, Section 16 of the Code of Alabama in the penal sum of \$1,915,102.38 and in which bond W. S. Newell Construction Co. and W. S. Newell, Inc., were the principals?

13. If your answer to the last interrogatory is in the affirmative please attach to your answers to these interrogatories a true and correct copy of said bond.

14. Did you, during the month of September, 1966, receive written notice, as surety on said bond, of the amount claimed by Reynolds Brothers Lumber Company, Inc. to be due to it and the nature of said claim?

15. If your answer to the last interrogatory is in the affirmative please state on what date you received such notice.

16. If you answer to interrogatory number 14 is in the negative please state whether John Hendrix, Jr. was, on September 27, 1966, an agent, servant or employee of yours.

17. If you have answered that you did receive such notice please state if such notice was received by you more than 45 days prior to the filing of this action against you.

18. Please state whether you, as surety on the bond hereinabove referred to, have paid to Reynolds Brothers Lumber Company, Inc., the Plaintiff in this cause, the amount of the claim as set forth in said notice to you.

CHASON, STONE & CHASON

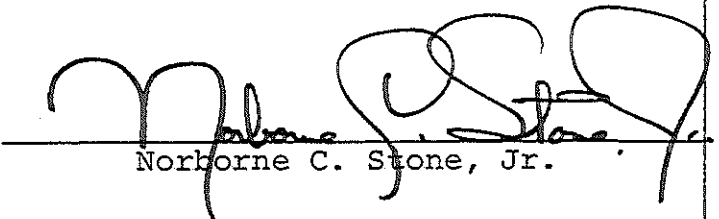
By:   
Attorneys for Plaintiff

STATE OF ALABAMA

BALDWIN COUNTY

Before me, the undersigned authority, personally appeared Norborne C. Stone, Jr., who is known to me and who, after being by me first duly and legally sworn, did depose and say under oath as follows:

That he is one of the attorneys for the Plaintiff in the above styled cause and that the answers to the above and foregoing instrument, if well and truly made, will be material evidence for the Plaintiff in said cause.

  
Norborne C. Stone, Jr.

Sworn to and subscribed before me  
on this the 11<sup>th</sup> day of November,  
1966.

  
  
Notary Public, Baldwin County, Alabama.

FILED

NOV 14 1966

ALICE I. DICK, CLERK

733

no. 9256

RECEIVED IN OFFICE  
NOV 15 1966  
RECEIVED  
NOV 14 1966  
M. S. BUTLER Sheriff

TAYLOR WILKINS  
SHERIFF

REYNOLDS BROTHER LUMBER COMPANY,  
a corporation,

Plaintiff,

VS

W. S. NEWELL CONSTRUCTION CO.,  
W. S. NEWELL, INC., and THE  
TRAVELERS INDEMNITY COMPANY, a  
corporation,

Defendants.

\* \* \* \* \*

IN THE CIRCUIT COURT OF  
BALDWIN COUNTY, ALABAMA

AT LAW NUMBER: \_\_\_\_\_

\* \* \* \* \*

INTERROGATORIES PROPOUNDED BY THE  
PLAINTIFF TO THE DEFENDANT, THE  
TRAVELERS INDEMNITY COMPANY, a  
corporation.

\* \* \* \* \*

CHASON, STONE & CHASON  
ATTORNEYS AT LAW  
P. O. Box 120  
BAY MINETTE, ALABAMA

Executed by serving 2 copies of  
the within on Walter L. Bussard  
Superintendent  
of Insurance, State of Alabama  
This The 16 day of Nov 1966

Sheriff of Montgomery County  
M. S. Butler,  
By J. L. Bussard D. S.

The Sheriff claims \$1.00 travel ex-  
pense on each of 1  
processes for a total of \$ 1.00

M. S. Butler Sheriff  
Montgomery County,  
Alabama.

REYNOLDS BROTHERS LUMBER  
COMPANY, INC., a corporation,

Plaintiff,

vs

W. S. NEWELL CONSTRUCTION CO.,  
W. S. NEWELL, INC., and  
THE TRAVELERS INDEMNITY  
COMPANY, a corporation,

Defendants.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

AT LAW NUMBER: \_\_\_\_\_

INTERROGATORIES PROPOUNDED BY THE PLAINTIFF TO  
EACH OF THE DEFENDANTS, W.S. NEWELL CONSTRUCTION  
CO. AND W.S. NEWELL, INC., SEPARATELY AND SEVER-  
ALLY

Comes now the Plaintiff in the above styled cause, by  
it's attorneys, and propounds the following interrogatories to  
the Defendants, W. S. Newell Construction Co. and W. S. Newell,  
Inc., separately and severally:

1. Please state your correct name and address.
2. Are you an individual, partnership or corporation?
3. If you answered that you are a corporation, please  
state your full and correct corporate name, under the laws of what  
state you were incorporated, and the location and address of your  
principal place of business.
4. If you answered that you are a partnership, please  
state whether said partnership is general or limited and the names  
of each partner together with his or her address.
5. If you answered that you are an individual, please  
state the correct name and address of the individual proprietor of  
your business.
6. If you answered that you are a corporation, please  
state if you were a corporation on August 3, 1964 and, if so, have  
been since that time up to and including the date on which this

action was filed against you.

7. If you have answered that you are a corporation incorporated under the laws of any state other than Alabama, please state whether you were doing business in the State of Alabama during the period of time from August 3, 1964 to the date on which this action was filed against you, both inclusive.

8. Were you doing business in Baldwin County, Alabama at the time this action was filed against you?

9. Did you do business in Baldwin County, Alabama during the period of time from August 3, 1964 to the date on which this action was filed against you, both inclusive?

10. Did you and the other Defendant to whom these interrogatories are addressed, enter into a contract on the 3rd day of August, 1964 with the State of Alabama in and by the terms of which you promised and agreed to furnish and deliver all the material and to do and perform all the work and labor required to be furnished and delivered, done and performed in and about the improvement and construction of a road in Baldwin County, Alabama known as Federal Aid Interstate Project No. I-10-1(18)54, Prop. "A", such contract being for the construction of the grading and drainage from Wilcox Road in Baldwin County, Alabama, East to the Florida State Line?

11. If your answer to the last interrogatory is in the affirmative, please attach a true and correct copy of said contract (not including plans and specifications, notices, proposals, etc.).

12. Please state whether you, either separately or jointly with the other Defendant to whom these interrogatories are addressed, subcontracted a part of the work and labor to be performed under said contract to Burke & Cooper Construction Company of 1807 Duncan Street, Mobile, Alabama.

13. If your answer to the last interrogatory is in the

affirmative, please attach to your answers to these interrogatories a true and correct copy of such subcontract or contracts, if more than one.

14. Please state whether Burke & Cooper Construction Company has completed its subcontract with you and, if so, the date on which such contract was completed and the date upon which final payment was made to it.

15. Please state if you required Burke & Cooper Construction Company to furnish you with either a performance bond or a labor and material bond under it's contract with you.

16. If your answer to the last interrogatory was in the affirmative, please attach a true and correct copy of the bond or bonds to your answers to these interrogatories.

17. Please state whether any person acting for or on behalf of Burke & Cooper Construction Company has executed and delivered to you an affidavit stating, in substance, that Burke & Cooper Construction Company has paid for all labor and materials furnished to it in completing it's subcontract with you.

18. If your answer to the last interrogatory was in the affirmative, please state who made such affidavit and attach a true and correct copy of the same to your answers to these interrogatories.

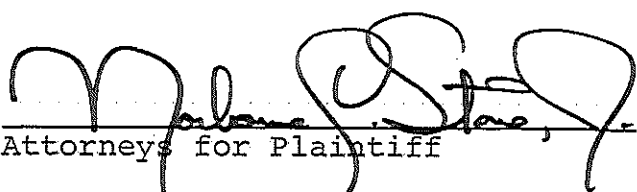
19. Please state whether final settlement has been made under your contract with the State of Alabama, and, if so, the date on which such final settlement was made.

20. If the Defendant, W. S. Newell Construction Co., has answered that it is a corporation, please state the names of the directors of said corporation and whether any of said directors are also directors of the Defendant, W. S. Newell, Inc. and

designate which of said directors are also directors of W. S.  
Newell, Inc.

CHASON, STONE & CHASON

By:

  
Attorneys for Plaintiff

STATE OF ALABAMA

BALDWIN COUNTY

Before me, the undersigned authority, personally appeared  
Norborne C. Stone, Jr., who is known to me and who, after being  
by me first duly and legally sworn, did depose and say under oath  
as follows:

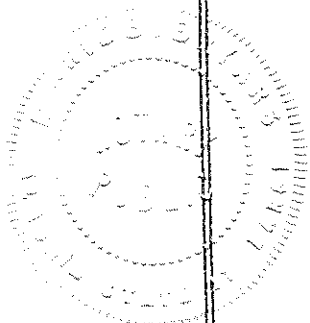
That he is one of the attorneys for the Plaintiff in the  
above styled cause and that the answers to the above and foregoing  
instrument, if well and truly made, will be material evidence for  
the Plaintiff in said cause.

  
Norborne C. Stone, Jr.

Sworn to and subscribed before me on  
this the 11<sup>th</sup> day of November, 1966.

  
Notary Public, Baldwin County, Alabama

FILED  
NOV 14 1966  
AUG 1 1966  
CLERK  
RECORDS



RECEIVED IN OFFICE

NOV 15 1966

RECEIVED

M. S. BUTLER, Sheriff

NOV 14 1966

TAYLOR WILKINS  
SHERIFF

EXECUTED BY SERVING A  
COPY OF THE WITHIN

W.S. Newell - owner Newell

Const. Co. & W.S. Newell

President W.S. Newell Inc.

This the 15 day of Nov 1966

M. S. BUTLER

Sheriff ~~Montgomery~~ County

By [Signature]  
Deputy Sheriff

REYNOLDS BROTHER LUMBER COMPANY,  
a corporation,

Plaintiff,

VS

W. S. NEWELL CONSTRUCTION CO.,  
W. S. NEWELL, INC., and  
THE TRAVELERS INDEMNITY COMPANY,  
a corporation,

Defendants.

\*\*\*\*\*

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

AT LAW NUMBER: 9256

\*\*\*\*\*

INTERROGATORIES PROPOUNDED BY THE  
PLAINTIFF TO EACH OF THE DEFENDANTS  
W. S. NEWELL CONSTRUCTION CO. AND  
W. S. NEWELL, INC., SEPARATELY AND  
SEVERALLY

\*\*\*\*\*

Same Complaint

CHASON, STONE & CHASON  
ATTORNEYS AT LAW  
P. O. Box 120  
BAY MINETTE, ALABAMA

The Sheriff claims \$1.00 travel exp-  
pense on each of 2  
process(es) or a total of \$ 2.00

M. S. Butler, Sheriff  
Montgomery County,  
Alabama.



REYNOLDS BROTHERS LUMBER	:	IN THE CIRCUIT COURT OF
COMPANY, INC., a corpora-	:	BALDWIN COUNTY, ALABAMA
tion,	:	
Plaintiff,	:	AT LAW
v.	:	
W. S. NEWELL CONSTRUCTION	:	
CO., et al.,	:	
Defendants.	:	CASE NO. 7256

Comes now each of the defendants in the above cause, separately and severally, and, for answer to Replication 2 filed in this cause, says the following:

The defendant joins issue thereon.

*Paul W. Brock*  
Paul W. Brock

*J. B. Blackburn*  
J. B. Blackburn  
Attorneys for said Defendants

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing pleading on Norborne C. Stone, Jr., Esq., attorney for plaintiff, on this, the 7th day of March, 1968.

*Paul W. Brock*  
Paul W. Brock

*Filed 3-7-68*  
*Reese French*  
*clerk*

REYNOLDS BROTHERS LUMBER : IN THE CIRCUIT COURT OF  
COMPANY, INC., a corporation, :  
Plaintiff, : BALDWIN COUNTY, ALABAMA  
v. : AT LAW  
W. S. NEWELL CONSTRUCTION CO., :  
et al, :  
Defendants. : CASE NO. 7256

ANSWERS TO INTERROGATORIES

Comes now the Travelers Indemnity Company, a corporation, and, for answers to the interrogatories heretofore propounded by the plaintiff, says the following:

1. The Travelers Indemnity Company.
2. Connecticut.
3. 1 Town Square, Hartford, Connecticut.
4. Insurance - including surety.
5. Yes.
6. Yes. Wilson Insurance and Realty Company, Bay Minette, Alabama.
7. Yes.
8. At least seventeen years.
9. Yes.
10. Yes.
11. Yes.
12. Yes.

13. Attached.

14. Yes.

15. September 19, 1966.

18. No.

A B Crawley  
A. B. Crawley, Supervising Adjuster,  
on behalf of The Travelers Indemnity  
Company.

STATE OF ALABAMA:

COUNTY OF JEFFERSON:

Before me, the undersigned Notary Public in and for  
said County in said State, personally appeared A. B.  
Crawley, who, being by me first duly sworn, on oath doth  
depose and say that he is Supervising Adjuster for The  
Travelers Indemnity Company, that he is cognizant of the  
facts contained in the above answers and that they are  
true and correct.

A B Crawley  
A. B. Crawley

Sworn to and subscribed before me on  
this, the 5 day of June, 1967.

Gertrude C. Adams  
Notary Public, Jefferson County, Alabama

FILED

AUG 10 1967

ALICE J. DUCK CLERK  
REGISTER

✓

**BOND FOR  
PAYMENT OF  
LABOR, MATERIALS, FEED-STUFFS OR SUPPLIES**

STATE OF ALABAMA,  
MONTGOMERY COUNTY.

KNOW ALL MEN BY THESE PRESENTS: That we \_\_\_\_\_

W. S. Newell Construction Co. &

W. S. Newell, Inc., Montgomery, Alabama \_\_\_\_\_

, as Principal, and

THE TRAVELERS INDEMNITY COMPANY

a corporation under the laws of the State of Connecticut

and having its principal office in the City of \_\_\_\_\_

, as

Surety, are held and firmly bound unto the STATE OF ALABAMA, in the penal sum  
One million nine hundred fifteen thousand

of one hundred two and 38/100

Dollars (\$ 1,915,102.38),

for the payment of which sum, well and truly to be made, we hereby bind ourselves, our  
heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF, we have hereunto set our hands and affixed our seals,

this 3<sup>rd</sup> day of August, 1964,

PROVIDED, HOWEVER, that the condition of this obligation is such that whereas  
W. S. Newell Construction Co. &

the above bound W. S. Newell, Inc.

have this day entered into a Contract with the said STATE OF ALABAMA, for the

building of 12.171 miles of road in Baldwin

County, known as Federal Aid Interstate

Project No.

I-10-1(18)54  
Prop. "A"

Located from Wilcox Road east to the Florida State Line on I-10

\_\_\_\_\_, a copy of which  
said Contract is hereto attached.

W. S. Newell Construction Co. &

NOW, THEREFORE, in the event that said W. S. Newell, Inc.

as such Contractor shall promptly make payment to all persons supplying him or them  
with labor, material, feed-stuffs, or supplies for or in the prosecution of the Work pro-  
vided for in said Contract, then this obligation shall be null and void and of no effect, oth-  
erwise to remain and be in full force and effect.

W. S. Newell Construction Co. &

PROVIDED, further, in the event that the said W. S. Newell, Inc.

\_\_\_\_\_, as such Contractor shall fail to make  
prompt payment to all persons supplying him or them with labor, materials, feed-stuffs,  
or supplies for or in the prosecution of the work provided for in such contract, the above

The Travelers Indemnity Company

bound

as Surety shall be liable for the payment of such labor, materials, feed-stuffs or supplies  
and for the payment of reasonable attorney's fees incurred by successful claimants or

plaintiffs in suits on said bond as provided in Title 50, Section 16, Code of Alabama 1940, as amended, Recompiled 1958.

PROVIDED, further, that said Contractor and Surety hereby agree and bind themselves to the mode of service described in Title 50, Section 16, Code of Alabama 1940, as amended, Recompiled 1958, and consent that such service shall be the same as personal service on said Contractor or Surety.

Upon the completion of said contract pursuant to its terms, if any funds remain due on said Contract, the same shall be paid to said Principal or Surety.

The decision of said State Highway Director upon any question connected with the execution of said Contract, or any failure or delay in the prosecution of the Work by said Principal or Surety, shall be final and conclusive.

The proposal, Specifications and the Contract hereinbefore referred to, and the Bond For Performance Of The Work executed under the provisions of Title 50, Section 16, Code of Alabama 1940, Recompiled 1958, are made a part of this obligation and this instrument is to be construed in connection therewith.

WITNESS our hands and seals, this 3rd day of August, 1964

\_\_\_\_\_  
(L. S.) W. S. NEWELL CONST. Co. (L. S.)

By H. A. Newell  
(Contractor)

\_\_\_\_\_  
W. S. NEWELL, INC.

\_\_\_\_\_  
By H. A. Newell

(Surety)

Countersigned by Alabama Resident

Agent for Surety

W. S. Newell, Inc.  
Name

Montgomery, Ala.  
Address

The Travelers Indemnity Company

By:

W. S. Newell, Inc.  
ATTORNEY-IN-FACT

REYNOLDS BROTHERS LUMBER  
COMPANY, INC., a Corporation,

Plaintiff,

VS.

W. S. NEWELL CONSTRUCTION CO.,  
W. S. NEWELL, INC., and  
THE TRAVELERS INDEMNITY COMPANY,  
a Corporation,

Defendants.

IN THE  
CIRCUIT COURT OF  
BALDWIN COUNTY, ALABAMA.

AT LAW.

NO. 7256

MOTION TO STRIKE PLEAS 5-A and 8

Comes now the Plaintiff in the above styled cause and moves the Court to strike 5-A and 8 of the amended answer filed on behalf of the Defendants and as grounds therefor says as follows:

1. That the amendment comes too late.
2. That the addition of said pleas and each of them to the answer at this stage of the trial of the case, and after the Plaintiff has rested his case renders the amendment dilatory.
3. That said amended pleas were not filed until after the Plaintiff had rested his case.
4. That the said amended pleas were filed immediately prior to the point at which the defendants' rested their case and after the Plaintiff had rested its case.

CHASON, STONE & CHASON

BY: 

Attorneys for the Plaintiff

Filed: March 7, 1968

MR. STONE: We are put in the position of having to demur~~re~~ to these pleas. We have a demurrer in the record which we originally filed to 1, 3, 4, 5, 6 and 7, and which your Honor sustained as to 1, 4, 5, and 6.

THE COURT: Look it over and see if you think the grounds are applicable to this.

MR. STONE: Let me do it this way:

With leave of the Court first had and obtained, I would like, at this time, to demur~~re~~ to Pleas 5-A and 8, separately and severally, and assign <sup>as</sup> grounds for said demurrer, grounds 1 through 13 as set forth in the demurrer heretofore filed in this cause on June 8, 1967, by the Plaintiff to pleas 1, 4, 5 and 6 and 7, and wherein the numbers referring to the last amended pleas - -

THE COURT: What grounds are you using?

MR. STONE: All of them - 1 through 13, and with leave of the Court changing by this dictation the references wherein the number 1 appears in the ground of demurrer, that that number be understood to be either 5-A or 8 and where the number 5 and the number 7 appears, that in each instance that those numbers shall be held to refer to both pleas, 5-A and 8.

MR. BROCK: That is all right with me to do it that way.

STATE OF ALABAMA

DEPARTMENT OF INSURANCE

FILED  
NOV 25 1966  
J. L. DICK, CLERK  
REGISTERED

I, the undersigned as Superintendent of Insurance for the State of Alabama, hereby certify that on the 16th day of November, 1966, I sent by registered mail in an envelope as follows:

Travelers Indemnity Company  
One Tower Square  
Hartford, Connecticut 06115

REGISTERED MAIL  
RETURN RECEIPT REQUESTED

bearing sufficient prepaid postage, a copy of a summons and complaint served upon me by the Sheriff of Montgomery County, Alabama, in a cause styled as follows:

Reynolds Brothers Lumber Company, Inc., a corp., Plaintiff

in the Circuit Court of Baldwin County

VERSUS

W. S. Newell Construction Co., W. S. Newell, Inc. (Name of Court)  
and The Travelers Indemnity Company, a corp., Defendant

And that on the 23rd day of November, 1966, I received the return card showing receipt by the designated addressee of said envelope on the        day of Not Shown, 1966.

Witness my hand and official seal this the 23rd day of November, 1966.

Belator A. Howard  
SUPERINTENDENT OF INSURANCE

Filed 11-24-66  
J. L. Dick  
Clerk