1063

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

October Term, 19 48-49

To the Clerk of the Circuit Court of 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

G. H. Bonie, Appellant,

and

Fred Griffin, Appellee,

wherein by said Court, at the ~~Term~~ 19, it was considered adversely to said appellant, were brought before our Supreme Court, by appeal taken, pursuant to law, on behalf of said appellant:

Now, it is hereby certified, That it was thereupon considered ordered and adjudged by our Supreme Court on the 26 day of May, 19 49, that said judgment of said Circuit Court be reversed and annulled, and the cause remanded to said court for further proceedings therein; and that it was further considered ordered and adjudged that ~~the appellee pay~~

~~Fred Griffin, appellee, pay~~

the costs accruing on said appeal in this Court and in the Court below

for which costs let execution issue.

Witness, J. Render Thomas, Clerk of the Supreme Court of Alabama, at the Capitol, this the 26 day of May, 19 49

J. Render Thomas

Clerk of the Supreme Court of Alabama.

THE SUPREME COURT OF ALABAMA

October Term, 19 48-49

1 Div., No. 358

G. H. Bonie

Appellant,

v.

Fred Griffin

Appellee.

From Baldwin Circuit Court.

CERTIFICATE OF REVERSAL

The State of Alabama,
County. } Filed

this day of 19

BROWN PRINTING CO., MONTGOMERY, ALA. 1958

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPRING TERM, 1949

1 Div. 358

G. H. Bonie,

v.

Fred Griffin,

Appeal from Baldwin Circuit Court.

STAKELY, JUSTICE.

The complaint as originally filed by Fred Griffin (appellee) against G. H. Bonie (appellant) contained one count, designated as count 1, which sought recovery on a promissory note executed by G. H. Bonie to Fred Griffin. Without objection counts 2 and 3 were added by amendment and these counts were common counts respectively for money paid and for money due by account. The pleas of the defendant were the general issue, payment and set off. There was verdict and judgment for the plaintiff both on count 1 and also on counts 2 and 3. Hence this appeal.

On March 15, 1946, G. H. Bonie, who is a contractor, entered into a written contract with Fred Griffin whereby G. H. Bonie agreed to erect a building on the property of Fred Griffin in Loxley, Alabama, for the sum of $32.749.30. It was stipulated that the building was to be constructed according to drawings and specifications attached to the contract and that the contractor was to furnish all labor and material for completion of the contract.

The contract contains the following provision:

> "4. If the owner shall upon written order signed by the contractor require any deviation from the said drawings and specifications or any additional or other work to be done to or than as described therein or any work therein described to be omitted, the contractor will carry out such requirement and perform the additional or other work in a substantial and workmanlike manner at such additional cost as shall be mutually agreed upon between the contractor and the owner."

On July 19, 1946, G. H. Bonie executed to Fred Griffin the note sued on in count 1. The note is for $3,000 and was payable on September 16, 1946, with interest at 8 percent from date. According to the defendant the note was made to evidence a loan made to supply him with advances under the contract to the extent of $3,000 and to help him to fulfill the contract. According to the plaintiff the note was made to evidence a loan of $3,000 which was made by the plaintiff to the defendant and which was entirely independent of the contract.

According to tendencies of evidence G. H. Bonie failed to complete his contract and it was necessary for Fred Griffin to take over the contract and complete the building in an amount approximately $11,000 in excess of the written contract. This is the claim on which counts 2 and 3 are based. According to the defendant he was asked to

do work in addition to that required by the contract and complied with the request. According to the defendant these additional items aggregated approximately $13,215.31 and these are the items on which the defendant based his plea of set off. The court refused to allow proof of this alleged set off on the theory that there was no compliance with the provisions of paragraph 4 of the contract in that there was no written order from the owner signed by the contractor calling for work additional to the original contract.

We think that the defendant should have been allowed to show that he furnished material and labor in connection with items which were in addition to the requirements of the original contract. It is no objection that no written contract or order covered these items, if the additional work was mutually agreed upon by the parties or done under circumstances implying mutual assent. The contract is not of that character which the law requires to be in writing and so the parties could alter or modify by parol the original written contract if such alteration or modification was supported by mutual assent. — Badders & Britt v. Davis, 88 Ala. 367, 6 So. 834; Davis v. Badders & Britt, 95 Ala. 348, 10 So. 422.

It seems to be true that G. H. Bonie did not complete the original contract and so it is argued that he cannot recover on his plea of set off. This is incorrect. The items for which recovery is sought in the plea of set off are items additional to the original contract. Liability for these items is predicated not upon the original contract but upon materials furnished and labor done and accepted pursuant to an arrangement which was mutual and additional

to the original contract.—Hutchison v. Cullum, 23 Ala. 622; M'Voy v. Wheeler et al., 6 Porter 201; 71 C. J. 108; 58 Am. Jur. p. 538, § 34.

During the taking of the evidence the defendant made a motion to transfer the cause to the equity side of the docket so that accounting could be had in equity. The court denied the motion. There was no error in this ruling. Among other things it is sufficient to say that such a motinn is not within the scope and influence of the statute providing for removal of the cause to the equity side of the docket. —Ex parte Dayton Dress Co., 234 Ala. 231, 174 So. 778.

For the error pointed out, the judgment of the lower court is reversed and the cause is remanded.

Reversed and remanded.

Brown, Foster and Lawson, JJ., concur.

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

1 *Div., No.* 358,

G. H. Bonie, *Appellant,*

vs.

Fred Griffin, *Appellee,*

From Baldwin *Circuit Court.*

The State of Alabama,
City and County of Montgomery,

I, J. Render Thomas, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages, numbered from one to 4 *inclusive, contain a full, true and correct copy of the opinion of said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.*

Witness, J. Render Thomas, Clerk of the Supreme Court of Alabama, this the 26th *day of* May, 1949.

J. Render Thomas

Clerk of the Supreme Court of Alabama.

THE SUPREME COURT OF ALABAMA

October Term, 19 48-49

1 Div., No. 358

B. H. Bonie
Appellant,

vs.

Fred Griffin
Appellee.

From Baldwin Circuit Court.

COPY OF OPINION

BROWN PRINTING CO., MONTGOMERY 1947

FILED
MAY 30 1949
ALICE J. DUCK, Clerk

APPEAL

FRED GRIFFIN, Plaintiff,		IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA.
VS.		
G. H. BONIE, Defendant.		AT LAW. NO. 1063.

Now comes the Defendant and appeals to the Supreme Court of the State of Alabama from the judgment rendered in this cause on November 1, 1948, in which cause Defendant's motion for a new trial was overruled on December 27, 1948.

Harry A Christian

Attorney for Defendant.

APPEAL

(8)

FRED GRIFFIN,

VS. Plaintiff,

G. H. BONIE

Defendant.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA.

AT LAW. NO. 1063.

Filed 1-22-49
Derick J. Venck
Clerk

FRED GRIFFIN, Plaintiff	)	IN THE CIRCUIT COURT OF
vs.	)	BALDWIN COUNTY, ALABAMA
G. H. BONIE, Defendant	)	AT LAW - CASE # 1063

AMENDED ANSWER

Comes the Defendant in this case and for an amended answer states that the note sued upon has been paid in full.

G. H. Bonie

G. H. Bonie, Defendant

Forest A. Christian

Forest A. Christian, Foley, Alabama
Attorney for Defendant

. . . . . .

CLAIM FOR SET-OFF

COUNT I

The Defendant claims of the Plaintiff the sum of SEVENTEEN THOUSAND NINE HUNDRED SIXTY FIVE & 24/100 DOLLARS ($17,965.24), as set-off, together with interest thereon, due from him by account, on, to wit: the 29th day of October, 1948, which sum of money, with interest thereon, is still unpaid.

COUNT II

The Defendant claims of the Plaintiff the sum of SEVENTEEN THOUSAND NINE HUNDRED SIXTY FIVE & 24/100 DOLLARS ($17,965.24), as set-off, together with interest thereon, due from him on account state between the Defendant and the Plaintiff on, to wit: the 29th day of October, 1948, which sum of money, together with interest thereon, is still unpaid.

COUNT III

The Defendant claims of the Plaintiff the sum of SEVENTEEN THOUSAND NINE HUNDRED SIXTY FIVE & 24/100 DOLLARS ($17,965.24), as set-off, together with interest thereon, due from him for merchandise, goods and chattels sold by the Defendant to the Plaintiff from, on to wit: the 15th day of March, 1946, until the completion of the building, on or about the 31st day of December, 1946, which sum of money, with interest thereon, is still unpaid.

COUNT IV

The Defendant claims of the Plaintiff the sum of SEVENTEEN THOUSAND NINE HUNDRED SIXTY FIVE & 24/100 DOLLARS ($17,965.24), as set-off, for work and labor done by the Defendant for the Plaintiff at his request on the 15th day of March, 1946, and thereafter, which sum of money, with interest thereon, is still unpaid.

COUNT V

The Defendant claims of the Plaintiff the sum of SEVENTEEN THOUSAND NINE HUNDRED SIXTY FIVE & 24/100 DOLLARS ($17,965.24), as set-off, as damages for breach of agreement entered into by him on the 15th day of March, 1946, in substance as follows:

See Exhibit "A" attached hereto.

The Defendant says that although he has complied with all the provisions of the contract on his part, the Plaintiff has failed to comply with the following provisions thereof, viz: The Plaintiff has failed to pay the Defendant the sum of TWO THOUSAND SEVEN HUNDRED SIXTY SEVEN & 63/100 DOLLARS ($2,767.63) as set-off, after allowing the Plaintiff due credit on the promissory note sued upon in the original suit, which sum of money, with interest thereon, is still unpaid.

The Defendant also furnished additional work and material under said contract at the request of the Plaintiff, which additional and material amounts to the sum of FIFTEEN THOUSAND ONE HUNDRED NINETY SEVEN & 61/100 DOLLARS ($15,197.61), as set-off, which sum of money, with interest thereon, is still unpaid.

G. H. Bonie

G. H. Bonie, Defendant

Forest A. Christian

Forest A. Christian, Foley, Alabama
Attorney for Defendant

There is attached hereto and made a part hereof the affidavit of a competent witness, made before a Notary Public, which shows the amount owed on this claim as of October 29, 1948.

Forest A. Christian

EXHIBIT "A"

THE STATE OF ALABAMA,)
)
BALDWIN COUNTY.)

This Agreement, made and entered into by and between Foley Bldg. and Mfg. Co. party of the first part, hereinafter called the contractor, and Mr. Fred Griffin, party of the second part, hereinafter called the owner, and the heirs, executors, administrators or assigns of both parties, for and in consideration of the sum of $32,749.30, WITNESSETH that the parties hereto do hereby agree as follows:

1. The contractor shall erect and build in a substantial and workmanlike manner a building upon the property owned by the said owner in the city of Loxley, Alabama, in accordance with the drawings and specifications signed by both parties and hereto annexed.

2. The contractor shall complete the said structure so as to be fit for occupation, and remove all surplus materials, plant, and rubbish off the premises by beginning and constructing the building as rapidly as possible unless prevented by strikes, accidents, weather or the inavailability of the materials beyond the control of the contractor or other reasonable cause.

3. The contractor shall provide all the materials and perform all the work mentioned in the said specifications or shown upon the said drawings, and shall provide all scaffolding, plant, tools, andappliances necessary for the performance of said work. The contractor shall also supply duly qualified and experienced artisans, workman, and formen to carry out the work.

4. If the owner shall upon written order signed by the contractor require any deviation from the said drawings and specifications or any additional or other work to be done to or than as described therein or any work therein described to be omitted, the contractor will carry out such requirement and perform the additional or other work in a substantial and workmanlike manner at such additional cost as shall be mutually agreed upon between the contractor and the owner.

5. The owner shall pay the contractor in respect of the said work and materials the sum of Thirty-two thousand seven hundred forty nine dollars thirty cents DOLLARS ($32,749.30), subject to additions and deductions as hereinbefore provided as follows: By payments of estimates or invoices covering labor expenditure or materials delivered to premises certified and approved by contractor for payments, up to an amount equal to 80% of total amount of contract. Remaining balance to be paid upon completions.

6. In all questions and disputes arising between the contractor and the owner with reference to this contract, each party hereto shall appoint one arbitrator and the two arbitrators shall appoint a disinterested person who shall act as the third arbitrator, the decision of any two of whom shall be conclusive.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this the 15th day of March, 1946.

Foley Bldg. and Mfg. Co.
By:
/s/ G. H. Bonie, contractor

Witnesses:

/s/ Fred Griffin, owner

It is understood that all structured steel is to be furnished and erected by the owner.

/s/ FG

AFFIDAVIT OF G. H. BONIE

THE STATE OF ALABAMA,)
)
BALDWIN COUNTY.)

G. H. Bonie, first being duly sworn, deposes and says as follows:

That during the year of 1946, he was sole owner of the Foley Building & Manufacturing Co.; that on the 15th day of March, 1946, he entered into an agreement with Fred Griffin of Loxley, Alabama, to construct and erect a building in Loxley, Alabama, which contract is set out in full in the claim for set-off in the pleadings, of which this affidavit is a part.

The consideration for the contract of the building was THIRTY TWO THOUSAND SEVEN HUNDRED FORTY NINE & 30/100 DOLLARS ($32,749.30). To this date Mr. Fred Griffin has made the following payments toward the contract price:

4/6/46	by check	$ 3231.85
4/12/46	" "	2000.00
4/20/46	" "	3500.00
4/27/46	" "	3411.02
5/4/46	" "	2500.00
5/11/46	" "	750.00
6/5/46	" "	605.00
7/3/46	" "	1065.86
7/12/46	" "	692.80
7/19/46	by note (advance)	3000.00
7/19/46	by check	1084.76
7/27/46	" "	961.14
8/2/46	" "	165.83
8/10/46	" "	1115.96
8/17/46	" "	542.45
8/23/46	" "	1539.83
9/11/46	" "	272.40
9/28/46	" "	1071.68
10/7/46	" "	575.22
10/16/46	" "	743.26
10/26/46	" "	301.25
11/3/46	" "	220.65
11/10/46	" "	455.64
11/17/46	" "	175.07
	Total	$29,981.67

Accordingly, there remains due and unpaid, the balance of $2,767.63, after allowing due credit on the promissory note sued upon by the Plaintiff in this case.

The contract further provides in paragraph # 4 (see Exhibit "A"), that any deviation or additional work shall be paid for by Fred Griffin, which additional work is as follows:

Additional concrete in foundation, 42 c/y @ $14.00....	$ 588.00
Additional bricks required to enlarge pilasters and walls per agreement, 11200 @ $80.00	896.00
Difference in cost of brick per our letter dated 2/26/46	671.10
Difference in cost of marquise built of concrete instead of wood.....	567.40
Difference in cost of platform at rear of building concrete instead of wood.....	375.45
Difference of cost of roof from original plan.....	1200.00
Additional plastering, 210 s/y @ $2.00.....	420.00
Difference in cost of office finishing, materials and labor.....	1523.94

Difference in cost of plate glass installation.....	$ 725.00
Two sky lights (cost) additional.....	480.92
Additional cost of metal work.....	174.80
Additional lumber used at rear of building, 104 pcs. 2 x 8, 2490 ft. @ $80.00.....	199.20
Additional Plumbing.....	142.70
Additional painting.....	210.00
Additional cost of brickwork and carpentry due to strike and other causes beyond our control.....	4155.00
Additional 8 x 12 concrete coping, 75 ft. @ $1.50	112.50
Reinforcing on footing, 1200 ft. 1" Rd. Reinforcing @ 267.....	260.20
Drain under floor (labor, 72 hrs. @ $1.00) and materials, 30 c/y gravel @ $3.50.....	177.00
Difference in tile work.....	134.50
7200 brick used building tank supports @ $28.00, at rear of building.....	201.60
Total additional work.....	$13215.31
Contractor's fee on additional work @ 15%.....	1982.30
Total for additional work and contractor's fee.....	$15197.61

The Defendant believes that the Plaintiff has made some payments to the materialmen on the additional work, but although, the defendant has called upon the Plaintiff, verbally and by letters dated May 21 and October 10, 1947, to render an accounting to him, the Plaintiff has failed to furnish the Defendant with any statement of account.

The amount owed on the original contract, after allowing all due credits, including the $3,000 promissory note sued upon, is ..... $ 2767.63

The balance owed for additional work, after allowing all due credits, is..... 15197.61
Total amount owed by Plaintiff and claimed as set-off $17965.24

G. H. Bonie

G. H. Bonie, Affiant

Sworn to and subscribed before me, a Notary Public in and for Baldwin County, Alabama, this the 29th day of October, 1948.

Notary Public

(4)

RECORDED

AMENDED ANSWER AND CLAIM FOR SET-OFF

FRED GRIFFIN,
Plaintiff

vs.

G. H. BONIE,
Defendant

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

AT LAW - CASE #1063

FILED
OCT 30 1948
ALICE J. DUCK, Clerk

LAW OFFICE OF
FOREST A. CHRISTIAN
FOLEY, ALABAMA

MOTION FOR NEW TRIAL

FRED GRIFFIN, Plaintiff	)	IN THE CIRCUIT COURT OF
vs.	)	BALDWIN COUNTY, ALABAMA
G. H. BONIE, Defendant	)	AT LAW

TO THE HONORABLE F. W. HARE, JUDGE OF SAID COURT:

Comes the Defendant and moves the court to set aside the verdict of the jury and the judgment of the court entered thereon and to grant unto the Defendant a new trial, and as grounds of said motion Defendant sets down and assigns the following separate and several grounds:

1. For that said judgment was obtained as the result of accident, surprise or mistake.

2. For that said judgment and verdict were contrary to law.

3. For that said judgment and verdict were contrary to the facts in the case.

4. For that said judgment and verdict are not sustained by the preponderance of the evidence.

5. For that the judgment is excessive.

6. For that the judgment and verdict were contrary to equity.

7. For that the said judgment and verdict were contrary to law and equity.

8. For that the court erred in not transferring this case to equity as a bill for accounting when requested by the Defendant.

9. The court erred in overruling the Defendant's set-off and counterclaim for work, labor and materials furnished for the use and benefit of the Plaintiff.

10. That there was unjust enrichment on the part of the Plaintiff in his accepting the additional work, labor and materials, with his knowledge, which work, labor and materials were in addition to the specifications as outlined in the contract.

11. That the judgment and verdict against the Defendant is contrary to law and equity in that the Defendant had no right to charge the Plaintiff with the expense of additional work, labor and materials

because the court ruled that any deviations from said drawings and specifications or any additional or other work to be done should be upon the written order of the owner, signed by the contractor and the contractor did not sign any such authorization.

12. That the Plaintiff furnished no itemized statement or proof that the Defendant owed him $11,510.74.

13. That the original suit was on a promissory note, which the Defendant could have proved had been paid if the court would have transferred it to equity for an accounting and the Defendant came prepared to defend the suit on the note only, but at the beginning of the trial the Plaintiff filed an answer in the nature of a set-off against a set-off claiming ELEVEN THOUSAND FIVE HUNDRED TEN & 74/100 DOLLARS ($11,510.74), against the Defendant and just prior to the time that the jury went out to consider the case, this additional claim in the amount of $11,510.74, was added as Counts 2 and 3, in the form of an amended complaint, and the Defendant was caught by surprise and had no opportunity to plead, answer or demur or to summons witnesses to defend this action, although the Defendant has a meritorious defense thereto.

14. The verdict of the jury is so vague, indefinite and uncertain as to not support a judgment for on the original complaint the following is written:

"We the jury find for the plaintian on the suit on the note and assesse his damages at $3740.00.

/s/ Jack Matthews, Foreman."

And below this on the original complaint the following is written:

"We the jury find the defendant guilty as charged and recommend that he pay the principal of the note with interest at 8% per annum or $540.00 and attorneys flee of $200.00 - total $3740.00.

/s/ Jack Matthews."

But on the amended complaint the following is written:

"We the jury find the defendant guilty and recommend the plaintiff be awarded $5,755.37 or 50% of the claim without interest.

/s/ Jack Matthews."

All of which makes the verdict so vague, indefinite, uncertain, ambiguous and defective that it cannot be known with certainty the verdict of the jury.

15. That the verdict is wrong and unjust.

_____
Defendant

_____
Attorney for Defendant

COPY

FOREST A. CHRISTIAN
ATTORNEY AT LAW
FOLEY, ALABAMA

January 17, 1949

Mrs. Louise Dusenberry
Circuit Court Reporter
Monroeville, Alabama

Re: Fred Griffin
vs: G. H. Bonie
Circuit Court of Baldwin County
Civil - Case # 1063

Dear Mrs. Dusenberry:

I have filed notice of an appeal in this case and I request that you make the original and two copies of a transcript of the record for an appeal to the Supreme Court of Alabama, and kindly send a copy to me, together with your bill, which I guarantee to be paid promptly.

Since time is getting short, I hope that you will render me prompt service in this matter.

Yours very truly,

Forest A. Christian

~~1.~~	~~DAN CAMP~~	BAY MINETTE
2.		
~~2.~~	~~FRED MCKENZIE~~	MAGNOLIA SPR.
3.		
~~3.~~	~~CLARENCE MOORE~~	FAIRHOPE
4.	W. D. WHITE	BAY MINETTE
5.	~~NED NOCKAN~~	~~BAY MINETTE~~ P
6.	~~WM. A. GLOVER~~	DAPHNE
7.	JACK MATTHEWS	BAY MINETTE
~~8.~~	~~WM. P. BALDWIN~~	ROBERTSDALE
~~9.~~	~~HENRY S. SKIPPER~~	~~LOXLEY~~ D
10.	ELMER V. LOVELL	SILVERHILL
~~11.~~	~~C. C. BROWN~~	~~JOSEPHINE~~ D
12.	J. A. MOTHERSHED	LOTTIE
13.	JOSEPH LIND	BAY MINETTE
14.	LAWRENCE BOSHEN	BAY MINETTE
15.	JOHN BROUGHTEN	BAY MINETTE
~~16.~~	~~EDWARD G. POOS~~	~~ROBERTSDALE~~ P
~~17.~~	~~CHARLES MENZEL~~	~~FOLEY~~
18.	GEORGE HEIDLEBERG	SILVERHILL
~~19.~~	~~COLMAN ARMSTRONG~~	~~BAY MINETTE~~
20	JESSIE M. BRANTLEY	DAPHNE
21	ROY MAHATHY	STAPLETON
22.	THOMAS J. DAVIDSON SR.	BAY MINETTE
~~23.~~	~~GEORGE HOLK~~	~~FOLEY~~
~~24.~~	~~YOUNG A. COX~~	~~STOCKTON~~

P ++++++

D ++++++

Fred Griffin
vs.
H. W. Bonie

~~1.~~	~~DAN CAMP~~	BAY MINETTE
2.		
~~2.~~	~~FRED McKENZIE~~	MAGNOLIA SPR.
3.		
~~3.~~	~~CLARENCE MOORE~~	FAIRHOPE
4.	W. D. WHITE	BAY MINETTE
5.	~~NED NOONAN~~	~~BAY MINETTE~~ R
6.	~~WM. A. GLOVER~~	DAPHNE
7.	JACK MATTHEWS	BAY MINETTE
~~8.~~	~~WM. P. BALDWIN~~	ROBERTSDALE
~~9.~~	~~HENRY S. SKIPPER~~	~~LOXLEY~~ D
10.	ELMER V. LOVELL	SILVERHILL
~~11.~~	~~C. C. BROWN~~	~~JOSEPHINE~~ D
12.	J. A. MOTHERSHED	LOTTIE
13.	JOSEPH LIND	BAY MINETTE
14.	LAWRENCE BOSHEN	BAY MINETTE
15.	JOHN BROUGHTEN	BAY MINETTE
~~16.~~	~~EDWARD G. POOS~~	~~ROBERTSDALE~~ R
~~17.~~	~~CHARLES HENZEL~~	~~FOLEY~~
18.	GEORGE HEIDLEBERG	SILVERHILL
~~19~~	~~COLMAN ARMSTRONG~~	~~BAY MINETTE~~
20	JESSIE M. BRANTLEY	DAPHNE
21	ROY MAHATHY	STAPLETON
22.	THOMAS J. DAVIDSON SR.	BAY MINETTE
~~23.~~	~~GEORGE HOLK~~	~~FOLEY~~
~~24.~~	~~YOUNG A. COX~~	~~STOCKTON~~

R ++++++

D ++++++

FRED GRIFFIN, Plaintiff, VS G. H. BONIE, Defendant.	)	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA AT LAW

DEMURRER

Now comes the Defendant and for demurrer to the Complaint, says:

1. It does not state a cause of action.

Attorney for Defendant.

Defendant demands trial of said cause by jury.

Attorney for Defendant.

(2)

DEMURRER

FRED GRIFFIN,

RECORDED

Plaintiff,

VS

G. H. BONIE,

Defendant.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
AT LAW

FILED
JUN 14 1947
ALICE I. DUCK, REGISTER
Clerk

SECURITY FOR COSTS OF APPEAL

FRED GRIFFIN, Plaintiff	)	IN THE CIRCUIT COURT OF
vs.	)	BALDWIN COUNTY, ALABAMA
G. H. BONIE, Defendant	)	AT LAW - CASE # 1063

We do hereby acknowledge ourselves security for costs on the appeal taken by the Defendant to the Supreme Court. And for the payment of the above security, we hereby waive our right to exemption of personal property under the Constitution and Laws of the State of Alaba ma.

G H Bonie
G. H. BONIE

Forest A. Christian
Forest A. Christian

Taken and approved this the 22nd day of January, 1949.

Alice J. Veach
Clerk

(18)

SECURITY FOR COSTS OF APPEAL

FRED GRIFFIN,

Plaintiff

vs.

G. H. BONIE,

Defendant

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
AT LAW - CASE # 1063

Filed 1-22-49
Alice J. Veick
Clerk

STATE OF ALABAMA
BALDWIN COUNTY

I HEREBY CERTIFY THAT I HAVE SERVED THE
FOREGOING PLEADING UPON THE PARTIES
TO THIS CAUSE BY MAILING A COPY
THEREOF TO EACH OF THEIR ATTORNEYS
OF RECORD, WITH PROPER POSTAGE
THEREON PREPAID.

THIS 22 DAY OF JAN. 1949.

G. H. BONIE

Defendant

FRED GRIFFIN

Plaintiff

vs.

G. H. BONIE,

Defendant

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
AT LAW - CASE # 1063

STATE OF ALABAMA
BALDWIN COUNTY

I HEREBY CERTIFY THAT I HAVE SERVED THE
FOREGOING PLEADING UPON THE PARTIES
TO THIS CAUSE BY MAILING A COPY
THEREOF TO EACH OF THEIR ATTORNEYS
OF RECORD, WITH PROPER POSTAGE
THEREON PREPAID.

THIS 22 DAY OF JAN. 1949.

G. H. BONIE

Defendant

LAW OFFICE OF
FOREST A. CHRISTIAN
FOLEY, ALABAMA

December 8, 1948

Honorable F. W. Hare
Judge of Circuit Court of Baldwin County
Bay Minette, Alabama

1063

Re: Fred Griffin, Plaintiff
vs: G. H. Bonie, Defendant

Dear Judge Hare:

On November 30, I filed a Motion for a New Trial in the case mentioned above and in support of my motion, I wish to furnish the following brief:

(1) a new trial may be granted when the judgment was obtained as a result of surprise, accident or mistake (Title 7, Sec. 276(3), Code of Alabama, 1940).

The original suit was on a promissory note, which the defendant could have proved had been paid if the court would have transferred it to equity for an accounting and the defendant came prepared to defend the suit on the note only, but at the beginning of the trial the plaintiff filed an answer in the nature of a set-off against a set-off claiming ELEVEN THOUSAND FIVE HUNDRED TEN & 74/100 DOLLARS ($11,510.74), against the defendant and just prior to the time that the jury went out to consider the case, this additional claim in the amount of $11,510.74, was added as counts 2 and 3, in the form of an amended complaint, and the defandant was caught by surprise and had no opportunity to plead, answer or demur or to summons witnesses to defend this action, although the defendant has a meritorious defense thereto.

(2) The trial court has power and duty to relieve against verdicts which, allowing all reasonable presumptions favoring them, are clearly wrong for any reason. Birmingham News Co. v. Lester, 133 So. 270, 222 Ala. 503.

(3) The judgment and verdict were contrary to the facts in the case. The jury is not the "sole judge" of the evidence to sustain their verdict. If it is contrary to the undisputed evidence, or against the great weight of the evidence, a motion for a new trial will be granted. Franklin Fire Ins. Co. v. Slaton, 240 Ala. 560, 200 So. 564; Sewall v. Glidden. 1 Ala. 52, 58.

(4) That the court erred in not transferring this case to equity as a bill for accounting when requested by the defendant. Tolleson v. Henson, 93 So. 456, 207 Ala. 529; City of Mobile v. McCown Oil Co., 143 So. 402, 226 Ala. 688; Marx v. Marx, 148 So. 418, 226 Ala. 684; Dewberry v. Bank of Standing Rock, 150 So. 463, 227 Ala. 484.

(5) Where a verdict of the jury is so vague, indefinite and uncertain that it cannot be, with certainty, known what particular judgment the correct administration justice requires, the court should grant a new trial. Sewall v. Glidden, 1 Ala. 52, 59; Doe ex dem Rowe, v. Goetchius, 61 So. 330, 331, 180 Ala. 381.

(6) That the court should grant a new trial when the judgment and verdict are not sustained by the preponderance of the evidence. Birmingham News Co. v. Lester, Supra. The plaintiff furnished no itemized statement of proof that the defendant owed him $11,510.74 or any other amount.

Respectfully submitted,

Forest A. Christian,
Attorney for Defendant

CITATION OF APPEAL

Moore Ptg. Co.

The State of Alabama
Baldwin County

IN THE CHANCERY COURT OF BALDWIN COUNTY

To ~~HxxMxxHall~~ Fred Griffin

Or To H. M. Hall, Solicitors of record.

Whereas, on the 22nd day of January, 1949, G. H. Bonie took an appeal from the ~~decree~~ judgment rendered on the 1st day of November 1948, by the Circuit Court of said county, in the cause of

FRED GRIFFIN

versus

G. H. BONIE

Now, therefore, you are cited to appear as required by law, before the Supreme Court of Alabama. to defend on said appeal, if you think proper so to do.

Witness my hand this 22nd day of January 1949

Clerk Circuit Co~~Register in Chancery~~.

(14)

FRED GRIFFIN Complainant

vs.

G. H. BONIE Respondent

CITATION OF APPEAL

IN EQUITY

Issued _____ day of _____ 193____

Moore Ptg. Co., Bay Minette

I hereby accept service this 22nd day of January 1949

Solicitor for Complainant

Div. No. _____ CERTIFICATE OF APPEAL (Civil Cases)

No. 1063 BALDWIN County, Circuit Court.

FRED GRIFFIN
Plaintiff
vs.
G. H. BONIE
Defendant

I, ALICE J. DUCK, Clerk of CIRCUIT Court, of BALDWIN County, Alabama, hereby certify that in the cause of FRED GRIFFIN Plaintiff, vs. G. H. BONIE Defendant, which was tried and determined in this Court, on the 1st day of November 19 48 in which there was a judgment for $5,755.37 Dollars, in favor of the Plaintiff, (or judgment for Defendant), the Defendant on the 27th day of December 19 48 took an appeal to the Supreme Court of Alabama to be holden of and for said State.

I further certify that G. H. BONIE and FOREST A. CHRISTIAN filed security for cost of appeal, to the SUPREME Court, on the 22nd day of January 19 48, and that G. H. BONIE and FOREST A. CHRISTIAN are sureties on the appeal bond.

I further certify that notice of the said appeal was, on the 22nd day of December 19 48, served on H. M. HALL as attorney of record for said appellee, and that the amount sued for was $5,755.37 Dollars.
(or certain lands) (or personal property)

Witness my hand and seal of this Court, this the 3rd day of February 19 49

Clerk of the Circuit Court of
BALDWIN County, Alabama

Fred Griffin
Plaintiff
v.
J H Borie
Defendant

In the circuit
Court of
Baldwin County
Alabama
at law

Amended answer

Now comes the Defendant
and denies each and every
allegation.

Defendant demands trial
by jury.

Fn & G Chastang
attorney for Defendant

Fn & G Chastang
atty for Defendant

(3) 1063 RECORDED

Fred Griffin
plaintiff
vs.
G H Bence
Defendant

Amended
Answer

Circuit Court
J B Calderwood
Clerk at law

FILED
SEP 30 1947
ALICE J. DUCK, Clerk

MOTION FOR NEW TRIAL

FRED GRIFFIN, Plaintiff vs. G. H. BONIE, Defendant	}	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA AT LAW

TO THE HONORABLE F. W. HARE, JUDGE OF SAID COURT:

Comes the Defendant and moves the court to set aside the verdict of the jury and the judgment of the court entered thereon and to grant unto the Defendant a new trial, and as grounds of said motion Defendant sets down and assigns the following separate and several grounds:

1. For that said judgment was obtained as the result of accident, surprise or mistake.

2. For that said judgment and verdict were contrary to law.

3. For that said judgment and verdict were contrary to the facts in the case.

4. For that said judgment and verdict are not sustained by the preponderance of the evidence.

5. For that the judgment is excessive.

6. For that the judgment and verdict were contrary to equity.

7. For that the said judgment and verdict were contrary to law and equity.

8. For that the court erred in not transferring this case to equity as a bill for accounting when requested by the Defendant.

9. The court erred in overruling the Defendant's set-off and counterclaim for work, labor and materials furnished for the use and benefit of the Plaintiff.

10. That there was unjust enrichment on the part of the Plaintiff in his accepting the additional work, labor and materials, with his knowledge, which work, labor and materials were in addition to the specifications as outlined in the contract.

11. That the judgment and verdict against the Defendant is contrary to law and equity in that the Defendant had no right to charge the Plaintiff with the expense of additional work, labor and materials

because the court ruled that any deviations from said drawings and specifications or any additional or other work to be done should be upon the written order of the owner, signed by the contractor and the contractor did not sign any such authorization.

12. That the Plaintiff furnished no itemized statement or proof that the Defendant owed him $11,510.74.

13. That the original suit was on a promissory note, which the Defendant could have proved had been paid if the court would have transferred it to equity for an accounting and the Defendant came prepared to defend the suit on the note only, but at the beginning of the trial the Plaintiff filed an answer in the nature of a set-off against a set-off claiming ELEVEN THOUSAND FIVE HUNDRED TEN & 74/100 DOLLARS ($11,510.74), against the Defendant and just prior to the time that the jury went out to consider the case, this additional claim in the amount of $11,510.74, was added as Counts 2 and 3, in the form of an amended complaint, and the Defendant was caught by surprise and had no opportunity to plead, answer or demur or to summons witnesses to defend this action, although the Defendant has a meritorious defense thereto.

14. The verdict of the jury is so vague, indefinite and uncertain as to not support a judgment for on the original complaint the following is written:

"We the jury find for the plaintian on the suit on the note and assesse his damages at $3740.00.

/s/ Jack Matthews, Foreman."

And below this on the original complaint the following is written:

"We the jury find the defendant guilty as charged and recommend that he pay the principal of the note with interest at 8% per annum or $540.00 and attorneys fee of $200.00 - total $3740.00.

/s/ Jack Matthews."

But on the amended complaint the following is written:

"We the jury find the defendant guilty and recommend the plaintiff be awarded $5,755.37 or 50% of the claim without interest.

/s/ Jack Matthews."

All of which makes the verdict so vague, indefinite, uncertain, ambiguous and defective that it cannot be known with certainty the verdict of the jury.

15. That the verdict is wrong and unjust.

G. H. Bonie
Defendant

James A. Clenahan
Attorney for Defendant

The above and foregoing Motion for a new trial is overruled and denied.
This Dec. 24th 1928
F. A. Hare

(7)

MOTION FOR NEW TRIAL

FRED GRIFFIN,

Plaintiff

vs.

G. H. BONIE,

Defendant

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
IN LAW

Filed 11-30-48
Alice Lenoir
clerk

Copy mailed
Hon. W. M. Hall

Fred Griffin Plaintiff v G. L. Bonie Defendant	In the Circuit Court of Bullock County Alabama at Law

Comes the Plaintiff and amends his Original Complaint by adding Count 2 & 3 as follows —

2

The Plaintiff Claims of the Defendant $1510.74 for money paid by the Plaintiff to the use of the Defendant on account of November & December 1946 and January through May 1947 which sum of money with the interest thereon is due and unpaid

3

The Plaintiff Claims of the Defendant $1510.74 due from Defendant by account on-or-about January 1, 1948 which sum of money with the interest thereon is due and unpaid

[illegible]
Atty for Plaintiff

(6)

RECORDED

Fred Gupp

v

G & B Inc

Amended Complaint

Filed Nov 1, 1968

Alice Neck
Clerk

We the jury find the defendant guilty and recommend the plaintiff be awarded $5,755.37 or 50% of the claim without interest.

Jack Matthews

COPY

FOREST A. CHRISTIAN
ATTORNEY AT LAW
FOLEY, ALABAMA

December 30, 1948

Honorable F. W. Hare
Judge of 21st Judicial Circuit
Monroeville, Alabama

Dear Judge Hare:

The other day I called you about a Motion for a New Trial with brief in the case of Fred Griffin vs. G. H. Bonie. I had been informed that you took this file with you, but this morning Mrs. Duck located the file and is sending it to you today. Tomorrow, Friday, December 31, will be the end of the 60 day period and I hope that you will take some action in my client's favor on December 31.

I thank you for your help in the past and wish you a very Happy New Year.

Respectfully yours,

Forest A. Christian

FRED GRIFFIN	)	
PLAINTIFF	)	IN THE CIRCUIT COURT OF
VS	)	BALDWIN COUNTY, ALABAMA
G. H. BONNIE	)	AT LAW
	)	NO. 1063

Now comes the Plaintiff and for answer to the Defendant's cross bill, says:

A.

That facts alleged therein are untrue.

B.

That the account sued on was paid in full before a commencement of this suit.

C.

That the Plaintiff and the Defendant entered into a written contract whereby the Defendant was to construct and complete for the Defendant, a building in the town of Loxley, Baldwin County, Alabama, at a cost of $32749.30; that the Plaintiff after entering upon the construction of the said building and partially completeing, failed or refused to carry out the terms of his contract and at was necessary for the Plaintiff to employ various parties to complete the building at a cost of $44260.04; that the Plaintiff, because of the conduct of the Defendant was caused to expend $11510.74, which amount the Plaintiff claims against the Defendant and offers the same as a set off against the claim of the Defendant and prays judgement for the excess.

S. Hm Sale

Attorney for the Plaintiff.

(5)

RECORDED

Filed 11-1-48
Alice J. Neuck
Clerk.

STATE OF ALABAMA
BALDWIN COUNTY

TO ANY SHERIFF OF THE STATE OF ALABAMA:

YOU ARE HEREBY COMANDED to summons G. H. BONIE, , to appear within thirty days from the service of this writ in the Circuit Court, to be held for said County at place of holding the same, then and there to answer the complaint ofFRED GRIFFIN.

WITNESS my hand this the 14 day of May, 1947.

Alice J Veuch

We the jury find for the plaintiff on the suit on the note and assesse his damages at $3740.00

Jack Matthews
Foreman

We the jury find the defendant guilty as charged and recommend that he pay the principal of the note with interest at 8% per annum $540.00 and attorneys fee of $200.00 - total $3740.00

Jack Matthews

FRED GRIFFIN PLAINTIFF VS G. H. BONIE DEFENDANT	)	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA, AT LAW

1.

The Plaintiff claims of the Defendant THREE THOUSAND ($3000.00) DOLLARS due by promissory note made by him on the 19th day of July, 1946, and payable on the 16th day of September, 1946, with interest thereon at 8% per annum from date.

The Defendant in and by said note waived all exemption under the constitution and laws of the State of Alabama or any other state, as to personal property, and agreed to pay all costs of collection or securing, or attempting to collect or securing the said note including a reasonable attorneys fee.

The Plaintiff claims of the Defendant the further sum of FIVE HUNDRED ($500.00) DOLLARS as a reasonable attorney's fee.

Attorney for the Plaintiff

Defendant's Address is Foley, Alabama

1063

Received in Sheriff's Office
this 14 day of May, 1947
TAYLOR WILKINS, Sheriff

Executed May 21 1947
by serving copy of within Summons and Complaint on

G H Bonie

Taylor Wilkins Sheriff
By H F Holt Deputy Sheriff

We the jury find for the Plaintiff on the Promissory note and assess his damages at $3800.00 plus an attorney's fee of $300.00, making a total of $4100.00

J. O. Driskell

1

1063 RECORDED

FRED GRIFFIN

PLAINTIFF

VS

G. H. BONIE

DEFENDANT

BILL OF COMPLAINT

FILED
MAY 14 1947
ALICE J. DUCK, Clerk

We further find for the Plaintiff on his claim against the Defendant for failure to complete his contract and assess his damages at $3000.00

J. O. Driskell

We the jury find the Defendant guilty as charged. Recommend that he pay the principal of the note with interest at 8% per annum or $3800.00 and attorney fee of $300.00 Total $4100.00

J. O. Driskell Foreman

We the jury find the defendant guilty and recommend the plaintiff be awarded $3,000.00 of claim

J. O. Driskell Foreman