

1975

John C. Hill v. Jacob Walstra, Mrs. Jacob Walstra, and Fray Walstra Zemp : Brief of Respondent

Utah Supreme Court

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CASE NO. 14104

JOHN C. HILL,

Plaintiff, and Respondent,

-vs-

JACOB WALSTRA, MRS. JACOB WALSTRA
and FRAY WALSTRA ZEMP,

Defendants and Appellants.

RESPONDENT'S BRIEF

Appeal From a Judgment
Awarded Plaintiff after Trial
Without a Jury, in the Third
District Court, Salt Lake County
Hon. Stewart M. Hanson, Jr. Judge

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

JOHN C. HILL,

Plaintiff and Respondent

-vs-

JACOB WALSTRA, MRS. JACOB WALSTRA
and FRAY WALSTRA ZEMP,

Defendants and Appellants

CASE NO. 14104

RESPONDENT'S BRIEF

STATEMENT OF KIND OF CASE

This is an action by Plaintiff, a building contractor, to recover the balance owing from Defendants for construction of two duplexes.

DISPOSITION IN LOWER COURT

Judgment was rendered in favor of Plaintiffs.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the judgment.

STATEMENT OF FACTS

Inasmuch as Appellant's "Statement of Facts" is not that at all, but an effort to re-try the case, we prefer to state our own.

The story has a familiar opening. Bill Zemp (husband of Defendant Fray) and Plaintiff were friends. Bill represented that he owned the property in question, which he did not, and they would then form a corporation, (R-253) but in the meantime, Plaintiff would build two duplexes on that property. ("Letter of Intent", Ex. 1-R, Referee's Report, which was drawn by an attorney, but NOT the writer. (R-253)

Plaintiff, after reviewing the Plans and Specifications, compiled an incomplete Cost Breakdown (R-254), gave that to Bill, who wrote the figures on the form, and handed it to the financing institution. They prepared a contract, based on those figures. (Ex. 1-D) Plaintiff signed the contract with the understanding that it was necessary to secure the funds to start construction, and that further funds would be made available. (R-256)

Besides, everyone was friendly. Plaintiff was given voucher authority against those funds for the payment of materials and labor during construction.

After the construction was commenced by Plaintiff, and during the course of construction, Defendants ordered additional work done, which is referred to as "extras", including, for example, removal of a tree and an old fence and installation of a new fence; excavation and leveling and the application of an asphalt surfaced driveway and additional parking areas, etc. Vouchers were issued

and \$2,591.08 of the expenses of these extras were paid out of the loan account by draws, (Referee's Report - R-42) and \$2,246.97 paid by Plaintiff from his own funds.

During the course of construction, Defendants, without the Plaintiff's prior knowledge, cancelled his voucher authority, apparently under the mistaken belief that Plaintiff had misused funds therefrom for his own purposes.

Fray Zemp then "took over", and without consultation with Plaintiff, purchased carpeting, ordered additional tile work, etc., at a cost in excess of firm bids previously secured by Plaintiff.

Surreptitiously, Fray and Bill Zemp withdrew all the balance in Plaintiff's bank account (\$1,012.10) and opened a joint personal checking account. This was made possible because Bill Zemp, who was a "friend" and partner in the Plaintiff's construction business, was permitted to sign checks on the account.

Despite these "shenanigans", Plaintiff completed the construction of the duplexes.

Plaintiff and Defendants were unable to agree on an accounting and for that reason Plaintiff instituted this action to recover the monies due him under the construction contract and for the extras performed by him at Defendants' request. The Defendants filed a Counterclaim.

The original trial date was scheduled for January 3, 1974 on which date the parties appeared before the Honorable Marcellus K. Snow, District Judge. Defendants' counsel moved at that time for the appointment of a Master or Referee. This Motion was resisted by Plaintiff on the grounds that Plaintiff was ready for trial. Motion was granted, however, and subsequently the Court appointed Jack T. Higginbotham. (R89-93)

The Referee had a consultation with the Attorneys for the parties during which it was agreed that his investigation should be based on the terms of the contract and the plans and specifications, rather than the incomplete cost breakdown on which the contract figure was based. (R-33; R-128)

The Referee's report was duly filed. Trial was scheduled for March 18, 1975.

Shortly before the trial the Referee discovered an error on Page 4 of his computations and at the trial testified concerning the errors and submitted a revised Page 4. (T-2-46; R-95-142)

The trial consumed four partial days. Plaintiff's Attorney submitted a Recapitulation based primarily on the Referee's report, but also, of course, on the testimony and exhibits in evidence, concerning the "extras" in dispute.

The Honorable Stewart M. Hanson, Sr., granted judgment in favor of Plaintiff and against Defendants for the sum of \$6,311.15. (R-18)

The Defendants filed a Motion for a new trial and prior to the argument of said Motion, Plaintiff's counsel discovered an error, favorable to the Defendants, and a Corrected Recapitulation was submitted at the time of said argument.

Based upon the Corrected Recapitulation the Court vacated the original judgment and entered judgment for the Plaintiffs in the sum of \$3,094.30, which includes interest and costs, as well as the bank funds that were withdrawn. (R-11)

POINT ONE

THE BURDEN IS ON THE APPELLANT TO OVERCOME THE PRESUMPTION OF THE VALIDITY OF THE JUDGMENT.

Appellant is attempting to re-try this case before the Supreme Court. All the contentions now advanced by Appellant were

fully presented to the Trial Judge. While the judgment is in favor of the Plaintiff and against the Defendants, the Court fully credited Defendants with all credits due them, and in addition ruled in favor of Defendants on Plaintiff's claim for a Contractor's fee, on the "extras", and \$798.88 for a cement floor re-laid to accommodate a third duplex which Defendants contemplated building. (R-16)

Who "prevailed" in this law suit, therefore, is open to dispute.

This Honorable Court has made it unmistakably clear that, on review, the judgment below will be affirmed, unless the Appellant can show that the findings of the Lower Court were clearly and unmistakably erroneous.

First Western Fidelity -vs- Gibbons & Reed, 27 Ut.2d 1, 492 P.2d 132 (and 19 other Utah cases in 2 West's Pacific Digest, Appeal & Error, (Pocket Parts) Key 930 (1), and the recent case of Wagstaff -vs- Remco (9/24/75 - Case #13690).

The Rule on Review is stated thus in the First Western Fidelity case:

"Where the appellant's position is that the trial court erred in refusing to make certain findings essential to its right to recover, and insists that the evidence compels such findings, it is obliged to show that there is credible and uncontradicted evidence which proves those contended facts with such certainty that all reasonable minds must so find. Conversely, if there is any reasonable basis, either in the evidence or from the lack of evidence upon which reasonable minds might conclude that they are not so convinced by a preponderance of the evidence, then the findings should not be overturned."

Here, the Trial Court based its judgment primarily on the Referee's finding, which were fully attacked by Appellant at trial, even though Appellants were the ones who insisted upon a Referee.

POINT TWO

ON APPEAL, THE EVIDENCE MUST BE REVIEWED IN A
LIGHT MOST FAVORABLE TO RESPONDENTS.

The rule recited in Christensen -vs- Christensen, 9 Ut.2d 102, 339 P.2d 101 (and in 22 Utah cases cited in 2 Wests Pacific Digest, Appeal & Error (Pocket Parts) Key 930 (1)), as well as the Wagstaff case, supra, is so well established, there can be no valid debate:

"...on conflicting matters the evidence on appeal is to be viewed in a light most favorable to the party for whom the judgment was entered, and when so viewed, if there is sufficient competent evidence supporting the judgment, it will not be disturbed."

The overwhelming evidence, both of the Referee, and in the trial, sustains the Trial Court's judgment in this case.

The Referee fully audited the entire project. He has listed items in dispute, and the Trial Court has ruled on those items, some rulings favoring the Plaintiff, and some the Defendants. The trial is ended, and the judgment should be affirmed.

Respectfully submitted,

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