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David Whyte, David B. Whyte, Dan E. Whyte, and Terry Whyte v. Derl Christensen and Mrs. Derl Christensen: Brief of Respondent

Utah Supreme Court

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Homer F Wilkinson; Attorney for Respondents.
Don Blackham, Mikel M Boley; Attorneys for Appellants.

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IN THE SUPREME COURT

OF THE STATE OF UTAH

DAVID WHYTE, DAVID B. WHYTE, DAN E. WHYTE, and TERRY WHYTE,

Plaintiffs-Respondents.

vs.

DERL CHRISTENSEN, and MRS. DERL CHRISTENSEN,

Defendants-Appellants.

Case No. 14151

BRIEF OF RESPONDENTS

Appeal from the Judgment of the Third Judicial District Court
Salt Lake County, State of Utah
Honorable Marcellus K. Snow, Judge

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FILED

APR 19 1976

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT

OF THE STATE OF UTAH

DAVID WHYTE, DAVID B. WHYTE, DAN E. WHYTE, and TERRY WHYTE, Plaintiffs-Respondents. vs. DERL CHRISTENSEN, and MRS. DERL CHRISTENSEN, Defendants-Appellants.	)	Case No. 14151

BRIEF OF RESPONDENTS

STATEMENT OF NATURE OF CASE

This is an action by respondents David Whyte, David B. Whyte, Dan E. Whyte, and Terry Whyte for wages for labor performed by them in the construction of an addition to appellants' home. A Second Cause of Action was alleged by the respondents but was not pursued and no evidence was introduced in support of it.

Appellants counterclaimed against respondent David Whyte for any amount found to be due laborers or materialmen, claiming payment by appellants to respondent David Whyte of the full contract price.

Appellants further claimed damages from respondent David Whyte for his failure to perform the work done upon appellants' home in a workmanlike manner.

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DISPOSITION IN THE LOWER COURT

The case was tried before a jury in the District Court of Salt Lake County before the Honorable Marcellus K. Snow. The jury returned a verdict and found:

1. That respondent David Whyte was hired by the appellants Christensen as a mere employee at an hourly wage rate and not as a contractor and awarded judgment to the respondents, and

2. That respondent David Whyte substantially completed the remodeling work he agreed to do and that all work done by him was done in a workmanlike manner and found no cause of action on the appellants' counterclaim.

RELIEF SOUGHT ON APPEAL

The respondents seek an affirmance of the judgment entered by the trial court and costs of this appeal.

STATEMENT OF FACTS

Respondents basically agree with appellants' Statement of Facts with certain clarification and modification as set forth in the Argument.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' MOTION FOR A DIRECT VERDICT AT THE CLOSE OF RESPONDENTS' EVIDENCE.

The appellants assert that respondent David Whyte was acting as a general contractor without a contractor's license. I refer the Court to Section 58-23-1, Utah Code Annotated, 1953, as amended, which provides that it is unlawful for a person to

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act in the capacity of a contractor unless he is licensed. It then provides that (1) The securing of any construction or building permit, or (2) The employment of any person on a construction project, or (3) The offering of any bid to do the work of a contractor shall be evidence of a person acting in the capacity of a contractor. If we examine the evidence in the principal case, we find that David Whyte did not meet any one of these requirements.

Whyte told Christensen that he must obtain a building permit and Christensen then went down and obtained the permit himself, and when Christensen obtained the building permit, he obtained it in the name of builder-owner, and Christensen testified that he was a self-builder. (R. 143) Christensen also testified that at no time did he ask Whyte to take out a building permit, because he knew that Whyte did not have a contractor's license. (R. 143) When the building was ready for inspection, Mrs. Christensen called the building inspector and had him come out and inspect it. (R. 186-187)

The respondent did not employ or hire any individual as an employee to work on the job. Whyte's three sons worked with him, but they were also employees of Christensen, for at the time the construction was discussed, Whyte mentioned this to Christensen and Christensen agreed to it. (R. 9, 129, 186) Christensen told Whyte that he did not know of any specialist and asked if Whyte would obtain them when needed. Whyte did contact the other craftsmen, but each time told them to see Christensen, and he would give them the directions as to the work he wanted done. Whyte never gave any directions to the

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other craftsmen nor was he present at any time they were working on the job. This was true in the case of the electrician (R. 16, 94), the heating man (R. 15, 78) and the plumber (R. 14, 104), and, in fact, with the plumber Whyte did not know him personally but just happened to contact him by phone at the supply house. (R. 14)

There is certainly not any evidence that a firm bid was given by Whyte to do the construction job. Christensen asked Whyte to give him a rough idea of how much it would cost to build the addition and Whyte told him it would cost approximately $6,000 plus the electrical work. (R. 8) While both appellants testified that Whyte never stated an amount, they said on a paper he had the figure of $5,500.00. (R. 127, 189, 190)

Numerous times during the construction period, additional work was done by Whyte at the direction of Christensen, such as the pouring of the garage floor and the patio, and changing a wall. (R. 28, 27, 37, 38) Christensen made changes in the work of the other craftsmen, and also had them do additional work which was not discussed originally between Whyte and Christensen. (R. 150, 154, 155, 78, 94, 105) Christensen also furnished certain materials, such as a storm door, bathroom accessories, and siding, which he would not have been required to do if it had been a firm contract. (R. 23, 24, 35, 150, 151, 181) Mrs. Christensen also worked on the job and so did Jerry, Mr. Christensen's brother-in-law, and if they had had a firm contract, then there would have been no reason to have these individuals work on the job. (R. 22, 23, 194)

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Appellants also refer to Section 58-23-3(3) which defines a contractor, and which provides that any person who for a fixed sum, price, fee, percentage or other compensation other than wages, undertakes with another person for the construction of a building, is a contractor. Again I refer the Court to the language of the legislature that it must be for a set sum. If it is for wages, then he is not a general contractor, and both the appellant (R. 9) and the respondent (R. 129) knew and testified that Whyte was working for wages. The only dispute was as to the exact amount of the wages. (R. 142, 143)

I refer the Court to the testimony given by Christensen on direct examination as found on pages 128 and 129 of the Record.

> Q (By Mr. Blackham) Did you have any discussion with Mr. Whyte, concerning what his charges for labor would be on this remodeling project?
>
> A He told us the charge that he would charge us would be, roughly, the same as what he made at the Post Office.
>
> Q And was any dollar-amount given as to what his charges would be?
>
> A Well, I knew, roughly, what his pay step was at the Post Office.
>
> Q But would the figure of $7.00 per hour--was this discussed?
>
> A No.
>
> Q And what was your understanding of what the amount that Mr. Whyte would be charging for his labor?
>
> A Just what he made at the Post Office, an hour.
>
> Q And did you have knowledge of what that amount would have been, then, in May of 1973?

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A Yes.

Q And what would that amount have been?

A Between five and six dollars, at that time.

Q Is that for what period of time?

A That was back in '73.

Q I know; be five or six dollars, per day, or what?

A Per hour.

Q Per hour. What was your rate of pay at the Post Office, at that time, Mr. Christensen?

A 5.65, an hour.

Q And did Mr. Whyte earn more at the Post Office, at that time, than you did?

A Yes, he did.

In the Utah case of Thorley v. Kolob Fish and Game Club, 13 Utah 2d 294, 373 P.2d 574, the appellant contended the respondent could not recover because he was an unlicensed contractor. The Court held a test to determine whether the relationship was that of an independent contractor or that of an employer and employee is the right of control. Throughout the course of construction Christensen continually exercised control over the job. He told Whyte that they would arrange for the cement and when it would be there. Whyte attempted to get some new siding to put on the home, and Christensen told him no, that he would find the old in the spring when the snow melts and put it on. Christensen would not allow Whyte to buy a new storm door but got one himself and also got other accessories and also exercised control over the work performed by the other craftsmen and told them how he wanted it done and made many changes from the original discussion.

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POINT II

THE DECISION OF THE JURY WAS IN ACCORDANCE WITH THE EVIDENCE.

The Court is well aware of the rule of review as set forth in the case of Charlton v. Hackett, 11 Utah 2d 389, 360 P.2d 176. (See also Lowe v. Rosenlof, 12 Utah 2d 190, 364 P.2d 418.)

> In considering the attack on the findings and judgment of the trial court it is our duty to follow these cardinal rules of review: to indulge them a presumption of validity and correctness; to require the appellant to sustain the burden of showing error; to review the record in the light most favorable to them; and not to disturb them if they find substantial support in the evidence.

Both the appellant and the respondent were full-time employees of the United States Post Office and saw each other daily. Whyte had had some experience as a builder and Christensen was desirous of having some remodeling done on his home. Christensen had not had building experience and did not know any craftsmen, so Whyte suggested various craftsmen to Christensen and had them contact him direct and he gave them directions as to what work should be done. Whyte also had a knowledge as to what material was needed in the construction and had an account with Anderson Lumber Company where he was able to get a 10 percent discount, and to save his friend money, said that he would charge the material in his name and Christensen could then pay him (R. 12, 13, 143, 150), being a loose relationship between friends, with Christensen wanting to get the work done as inexpensively as possible. I refer the Court to the discussion set forth in Point I as to the further relationship between the two.

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POINT III

INSTRUCTION NO. 5 REPRESENTS THE LAW IN THE STATE OF UTAH.

Instruction No. 5 was neither confusing to the jury nor prejudicial to the appellants.

The Utah Supreme Court in the case of Thorley v. Kolob, supra, held,

> An important test to determine whether the relation is that of an independent contractor or that of an employer and employee is the right of control. The right to end the services whenever the party sees fit is also an important test.

The Utah Code Annotated, Section 58-23-3(3) defines a contractor as one who is working for other than wages.

Respondents submit that there is no unclarity or confusion in Instruction No. 5, but looking at it in the light most favorable to appellants, alleges that appellants failed to read the Instruction as a whole. The appellants in their argument have taken Instruction No. 5 out of context without relating it to the other Instructions given by the Court. The Court in Instruction No. 25, specifically instructed the jury that they are to consider all the Instructions as a whole and to regard each in the light of all the others. Instructions Nos. 4, 9, 10 and 11 clarify and exemplify Instruction No. 5, and when read as a whole could leave no doubt in the minds of the jury what the meaning and intent of Instruction No. 5 was.

CONCLUSION

This Court should uphold the trial court and find the evidence is sufficient to affirm the judgment in favor of

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respondents and against appellants.

Respectfully submitted,

Homer F. Wilkinson
Attorney for Plaintiffs and
Respondents

CERTIFICATE OF DELIVERY

I hereby certify that I personally delivered two copies of the foregoing to Don Blackham, Attorney for Defendants-Appellants, at 3535 South 3200 West, Salt Lake City, Utah 84119, this day of April, 1976.

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