

1977

Kirk Nelson dba Nelson Sheet Metal v. Richard Watts dba Richard Watts Construction Company and Leon Carver : Brief of Appellant

Utah Supreme Court

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Lyle W. Hillyard; Attorney for Defendant-Appellant;

Dale M. Dorius; Attorney for Plaintiff-Respondent;

Recommended Citation

Brief of Appellant, *Nelson v. Watts*, No. 14596 (Utah Supreme Court, 1977).
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Dale M. Dorius
P. O. Box 165
Brigham City, Utah
84302

Attorney for Plaintiffs
Respondents

TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	2
ARGUMENT	3
POINT I: THE EVIDENCE, AS A MATTER OF LAW, IS INSUFFICIENT TO SUPPORT THE JURY VERDICT FOR PLAINTIFF	3
POINT II: THE LOWER COURT CORRECTLY PRESENTED THE LAW TO THE JURY IN INSTRUCTIONS ON THE BURDEN OF PROOF ON RESPONDENT	9
POINT III: DESPITE A GENERAL RELUCTANCE TO DO SO, THE LOWER COURT ERRED IN NOT OVERTURNING THE VERDICT AS RESULTING IN A MISCARRIAGE OF JUSTICE	10
CONCLUSION	11

CASES CITED

	Page
<u>Alvarado v. Tucker</u> , 2 U2d 16, 268 P.2d 986 (1954).....	10
<u>Anderson v. Nixon</u> , 139 P.2d 216 (Utah 1943)	11
<u>Burnett v. Reyes</u> , 113 Cal. App. 2d Supp 878, 256 P.2d 91 ..	10
<u>In re Richards Estate</u> , 5U. 2d 106, 297 P. 2d 542 (1956)	10
<u>Lund v. Phillips Petroleum Co.</u> , 351 P.2d 952 (Utah, 1960)..	11
<u>Price v. Sinnett</u> , 460 P.2d 837 (Nev., 1969)	10
<u>Reynolds v. Strable</u> , 123 Cal. App. 716, 13 P.2d 690 (1933)	11

IN THE SUPREME COURT
OF THE STATE OF UTAH

NORM NELSON dba NELSON SHEET)
METAL,)
)
Plaintiff and Respondent,)
)
vs.)
)
RICHARD WATTS dba RICHARD WATTS)
CONSTRUCTION COMPANY and LEON CARVER,)
)
Defendants and Appellant.)
)

Case No. 14956

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an action to recover on an oral contract for performance of work in construction of a federal building.

DISPOSITION IN LOWER COURT

This case was tried before a jury. Judgment was granted for Plaintiff, here Respondent, in the amount of \$1,678.18 without interest or attorney fees.

RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the judgment and a dismissal of the Complaint as stating no cause of action. Costs should be awarded to Appellant.

STATEMENT OF THE FACTS

In 1969, Appellant, Richard Watts, as general contractor, accepted a contract to construct a building in Logan, Utah, known as the Logan Armory Building. To complete that construction, a bid was accepted from Leon Carver, doing business as Leon Carver Heating and Plumbing Company, to do the plumbing and heating sub-contract work in the amount of \$55,000.00.

Appellant required the above named subcontractor to furnish a list of all subcontractors and suppliers used by him because Appellant upon advise of his bonding company, was concerned about Carver's financial ability. (Tr. 41-42) Kirk Nelson, Respondent, was not on the list submitted. Then in August, 1969, Carver filed bankruptcy. Respondent did not file any lien against Appellant's bond or avail himself of any relief afforded by law to suppliers.

Appellant made payments for services and materials to those subcontractors from Carver's list as the work was completed until May, 1970. At that time he received a bill from Respondent made payable from Leon Carver and himself. Upon receipt of the bill Appellant, through his secretary, Dawn Draney, contacted various subcontractors and suppliers of Leon Carver and found numerous other small bills incurred by Carver without Appellant's knowledge. By May, 1970, Appellant had paid Carver for almost all the work done, including the duct work in question, and there was insufficient money retained

by Appellant to pay the additional bills claimed on the part of Respondent.

On May 3, 1974, an action was filed by Respondent against Appellant and Leon Carver for the debt in question. At trial, Respondent presented evidence that sometime in December, 1969, he had a conversation with Appellant, Appellant agreed to be responsible for this work, thereby creating an oral contract between the two parties.

ARGUMENT

- I. THE EVIDENCE, AS A MATTER OF LAW, IS INSUFFICIENT TO SUPPORT THE JURY VERDICT FOR RESPONDENT.

Appellant realizes the difficult task involved in appealing a jury verdict against him. Conceding this fact, the undersigned assures the Court that this appeal is taken with utmost seriousness for two reasons. First, in considering the testimony, the documentary evidence, and the inferences reasonably drawn therefrom, it is apparent that the verdict is not supported by the facts. Secondly, the effect of such a verdict is to place such a heavy liability upon a general contractor as to make it impossible to protect himself in his dealings with subcontractors and suppliers. To avoid such blatant injustice, Appellant feels compelled to present the case to the Court to review the facts and applicable law as set forth herein.

Significantly, the only testimony to substantiate Respondent's claim is the testimony of his relative, John Henry Bott, and his own testimony. On page 6 of the trial record, Respondent contends that a conversation was held.

Q. Did you have a conversation at that time with Mr. Watts?

A. Yes, I did.

Q. Could you tell us who was present at the time this conversation took place?

A. There was Mr. Watts, Mr. Carver, Mr. Bott and myself.

Q. And could you tell us, if anything, what was said during this conversation if you recall?

A. Yes. The conversation was that I did not bid the job, I didn't give Mr. Carver a bid on the job, and that I knew for a fact that Mr. Carver was in financial trouble and that I could not do the job for him.

Q. Okay. And could you tell us what the conversation was between you and Mr. Watts and Mr. Carver at this time?

A. Yes. I told Mr. Watts that if I did the work I would have to be doing it for him, that I didn't feel that Mr. Carver could pay for it.

Q. And could you tell us, if anything, what Mr. Watts said to this?

A. Mr. Watts told me that he was paying all the bills and to get busy and get the job done and he would see that it was paid for.

By his own admission, there was no agreed upon price for the job.

Q. Okay. Now you said at this time there was no written contract ever drawn up or even tendered on your part or written notice at all to Mr. Watts about what it was going to cost to do the sheet metal work?

A. No. I indicated to him that I hadn't seen the plans prior to this conversation, and I, of course, couldn't give him the price at that time.

Q. And was there any discussion at all about what the price was going to be?

A. I don't think so, no. (Tr. 16, 1. 11-20)

Further, Respondent's actions were not consistent with his claims.

Q. And you were going to be tied in with Mr. Carver, isn't that correct; you wanted to protect yourself in this job?

A. I wanted to protect myself.

Q. And still, you did not write any written notice or letter at all confirming any agreement as to what you understood the agreement with Mr. Watts would be?

A. He, Mr. Watts, promised to pay, and that was enough for me.

Q. What is how you recall the conversation?

This testimony is corroborated only by Bott, who, upon direct examination, testified that he could remember only a part of the conversation which took place among Watts, Carver, and Nelson at the Armory in December, 1969.

Q. Okay, just relate what Mr. Watts said.

A. Mr. Watts stated that he would pay the billing of the time and material, and that's the only thing that I remember of it, sir.

Q. Was anything else said during this conversation that you can recall?

A. No, sir.

Q. Where you present subsequently on any occasions while Mr. Nelson was doing work on this Armory?

A. No. (Tr. 18, l. 18-28)

It is indeed curious that the only words he could remember from that day constitute the only corroborative evidence offered by Respondent in the instant case. Leon Carver, the only other party to the conversation never heard Appellant promise to pay Respondent for work done. His account was that a conversation began and he left subsequently. (Tr. 21)

Appellant, while acknowledging that there could have been conversations of a general nature, denies that he was advised that Kirk Nelson was working with Carver, that he ever assumed responsibility for any debt incurred by Kirk Nelson and denies any conversation to that effect. (Tr. 39,40) In fact, Appellant was not even aware that Respondent was on the

in May, 1970, with a bill in hand, for materials and services.
(Tr. 39, 1. 2427)

A perusal of the record demonstrates that Appellant, on the advice of his bonding company, took extra precautions to protect the company from subcontractors who would not pay their bills. For example, the express purpose of Appellant's requiring the itemized statements set forth as Exhibits No. 1 and No. 3 was to determine with whom Defendant Carver was dealing. (Tr. 42) According to the procedure, Appellants company would then have a permanent record of parties involved. Also, after Respondent came to his office in May, 1970 Appellant directed his secretary to investigate any further outstanding bills and prepare a list of such bills incurred by Carver. (Tr. 57) This list confirms the very suspicions expressed by the bonding company. (Defendant's Exhibit #11) Such diligence on Appellant's part as shown by the record should not have been rewarded with a judgment requiring him to pay again for work completed and already paid for by Appellant.

Another precaution taken by Appellant in the general course of business is requiring any subcontractor to sign a subcontract agreement when the company enters into such a relationship. (Tr. 43, 1. 14) On redirect by Mr. Dorius in reference to prior dealings, Appellant testified that on a previous occasion Respondent had done general sheet metal and mechanical work for Appellant under a signed written subcontract agreement. It

is difficult to invent reasons why Appellant would not have had Respondent sign a similar agreement if there had, in fact, been one at all. No reasons are offered by Respondent.

Documentary evidence is in complete support of Appellant's position also. The Court will note that the two invoices designated as Plaintiff's Exhibits No. 1 and No. 2, dated March 7, 1970, and May 16, 1970, consecutively, are both made out to Leon Carver, the former even being sent to his address in Brigham City, Utah. It is totally inconsistent with Respondent's allegation of an oral contract in December, 1969, that he should wait until May, 1970, to bill Appellant, especially since he had billed Leon Carver alone in March of 1970. Further, Respondent had more than ample opportunity to protect himself either 1) by requiring a written contract, 2) by sending direct billings to Watts as the work progressed, or 3) by filing action on a bond as provided by U.C.A. This litigation was also filed against Mr. Carver as a co-defendant.

Clearly, the preponderance of the evidence is against the existence of any oral agreement. To allow Respondent to wait four years to file on an oral contract which, if it existed at all, was only in Respondent's imagination, is to place a heavy burden on a contractor to guard against unfounded claims for payment. In effect, the verdict of the lower Court jury, not being based on substantial evidence, contravenes the very intention of the law's preference for written agreements -- to discourage parties from entering into vague or unenforceable

oral agreements in which owners, contractors and subcontractors are unsure of their obligations. Since the construction industry is not well served by allowing such injustice to go unchecked, the verdict should be overturned and judgment of the lower Court be reversed.

II. THE LOWER COURT CORRECTLY PRESENTED THE LAW TO THE JURY IN INSTRUCTION NO. 4 ON THE BURDEN OF PROOF ON RESPONDENT.

Instruction No. 3 places the burden of proving the existence of a contract upon the Plaintiff - Respondent. It states the following as elements which must be proved for Respondent to prevail: (1) that there was a direct oral contract whereby Plaintiff - Respondent was employed by Appellant and (2) that an agreement to guarantee payment in the event of Lawyer's default must be in writing unless the promise to pay was made as part of the original employment contract. Respondent proved neither of these elements as demonstrated by the lack of substantial evidence to establish an oral contract at all. According to the record, Instruction No. 4 reads in part:

That unless the truth of the allegation is proved by a preponderance of the evidence, you shall find the same not to be true.

The term "preponderance of the evidence means such evidence as when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. (Tr. 61)

The function of this Instruction, as in any Instructions on burden of proof, is to tell the jury how it should weigh the evidence. In re Richard's Estate, 5 U. 2d 106, 297 P.2d 542, 54 (1956). It is then "the duty of the jury to be governed by the instructions and when given they become the law of the case, whether right or wrong." Price v. Sinnett, 460 P. 2d 837,840 (Nev., 1969).

The Instruction No. 4 is correct on authority of Alvarado v. Tucker, 2 U. 2d 16,268 P.2d 986 (1954) and Burnett v. Reyes, 118 Cal, App. 2d Supp. 878,256 P.2d 91, 93. A "preponderance" means "The greater weight of the evidence, or as sometimes stated, such degree of proof that the greater probability of truth lies herein." Alvarado, supra, at 988. However, it was clearly not followed by the jury in light of the substantial testimonial and documentary evidence in favor not of Respondent, but in favor of Appellant as outlined above. See Point I.

III. DESPITE A GENERAL RELUCTANCE TO DO SO, THE LOWER COURT ERRED IN NOT OVERTURNING THE VERDICT AS BEING A MISCARRIAGE OF JUSTICE.

After a careful reading of the evidence presented, it is apparent that the jury verdict is not supported by the facts and is strictly a sympathetic verdict rendered on a 3/4 basis for Respondent. To the contrary, there is substantial evidence to support Appellant's denial of the alleged oral contract. "A jury may not conjecture or speculate, but must have substant

evidence upon which to base a verdict." Anderson v. Nixon, 139 P.2d 216, 220 (Utah, 1943). See also Reynolds v. Strable 128 Cal. App. 716, 18 P.2d 690 (1933). Not even the outer bounds of reason afford room to determine that the evidence discussed above is in substantial support of an oral contract as alleged by Respondent.


There is ground for overturning a jury verdict such as this "when it is plainly apparent that the jury has abused its prerogatives by refusing to accept uncontroverted credible evidence or otherwise ignoring or misapplying proven facts or established law." Lund v. Phillips Petroleum Co., 351 P.2d 952,953 (Utah, 1960) and cases cited therein. In this case, there is not even equally strong evidence in support of Respondent's claim from which the jury could have found as it did. Clearly the jury ignored substantial evidence to the detriment of Appellant and the verdict should have been overturned as a gross miscarriage of justice.

CONCLUSION

That the evidence by a preponderance is required for a verdict in a civil case is correctly stated and given to the jury in Instruction No. 4. Although under a duty to adhere to such dictates of law, the jury in this case clearly disregarded its mandate that a preponderance or substantial sufficiency of evidence be the basis of its verdict.

The preponderance of evidence does not show an agreement was made between Appellant Richard Watts, and Respondent Kirk Nelson in December, 1969, but reflects instead a self-serving declaration by Respondent and a relative that he wanted to be paid for work completed in the absence of any agreement with Appellant. Respondent did not even attempt to protect himself through any written agreement, periodic payment schedule, or lien rights as provided by law. To allow Respondent to wait four years to file on an oral contract, the existence of which is not supported by the evidence, places a burden on the general contractor far in excess of what the law imposes. For the protection of all parties involved and for those similarly situated, the judgment of the lower Court should be reversed and the Complaint dismissed as stating no cause of action with Appellant awarded his costs.

Respectfully submitted this 20th day of August,
1976.


Dale W. Hillyard
Attorney for Appellant
175 East First North
Logan, Utah 84321

I hereby certify that I mailed eleven (11) copies
of the foregoing brief of Appellant to the Utah Supreme Court
of Utah, two (2) copies to Plaintiff - Respondent's attorney,
Dale M. Dorius, P. O. Box 165, Brigham City, Utah 84302, this
26th day of August, 1976.

Llew. Hulse