

2008

Mark D. Bergman v. Debbie A. Burke, Dorene R. Basug, and First American Title : Brief of Appellant

Utah Court of Appeals

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COPY

IN THE UTAH APPELLATE COURT

MARK D. BERGMAN
Plaintiff
Appellant and Cross Appellee
v.

CASE BRIEF

DEBBIE A. BURKE, DORENE R. BASUG,
and FIRST AMERICAN TITLE
Defendant(s)
Appellee(s) and Cross Appellant(s)

DOCKET No. 20080323-CA

BRIEF OF THE APPELLANT

Appeal from the final judgment and order entered upon the record on or about January 16, 2008, from the Second District Court in and for Weber County, State of Utah, following a two-day bench trial that commenced November 17, 2007, the Honorable Parley R. Baldwin presiding.

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Coral Requested

Appellant's/Plaintiff's Case Brief

FILED Page 1
UTAH APPELLATE COURTS

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COPY

IN THE UTAH APPELLATE COURT

MARK D. BERGMAN)	
Plaintiff)	
Appellant and Cross Appellee)	CASE BRIEF
v.)	
)	
<u>DEBBIE A. BURKE</u> , DORENE R. BASUG,)	
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Appellee(s) and Cross Appellant(s))	

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CONTROLLING STATUTES AND RULES

The controlling provisions of the Mechanic's Lien Act relating to the contractual issues of the parties are:

1. Utah Code Ann. § 38-1-2 (2002), **"Contractors" and "subcontractors" defined.**

Any person who does work or furnishes materials by contract, **express or implied**, with the owner, as provided in this chapter, shall be considered an original contractor, and all other persons doing work or furnishing materials shall be considered subcontractors. (Emphasis added)

2. Utah Code Ann. § 38-1-3 (1994) **Those entitled to lien -- What may be attached.**

Contractors, subcontractors, and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, ... ~ **whether at the instance of the owner or of any other person acting by his authority as agent, contractor, ~**
... This lien shall attach only to such interest as the owner may have in the property. (Emphasis added)

The following rules are also applicable to this appeal:

3. Rule 24(a)(9), Utah Rules of Appellate Procedure, Briefs

. . A party challenging a fact finding must first marshal all the record evidence that supports the challenged finding.

4. Rule 52, Utah Rules of Civil Procedure (2006), FINDINGS BY THE COURT.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon. . .

PARTIES

The names of the original parties to this action are contained in the caption of this brief. However, only Debbie A. Burke remains a Defendant in this instant action.

- **“Defendant,”** hereinafter refers to Debbie A. Burke, the sole owner named on the fee simple title of the real property at issue.
- **“Plaintiff,”** hereinafter refers to Mark D. Bergman, the carpenter/handyman hired by the Defendant and Vince Isbell (hereinafter “Defendant’s Agent”) to complete various projects to the interior and exterior of the Defendant’s real property.

Others of Significant Interest

- **“Defendant’s Agent,”** (as defined above) is the Defendant’s husband, a General Contractor licensed with the State of Utah and the individual authorized by the Defendant to supervise the repair and renovation work on the property at issue.
- **“Listing Agent,”** hereinafter refers to Laura L. Strebel, the Plaintiff’s wife and the Defendant’s duly authorized Real Estate Agent engaged by the Defendant to market the Defendant’s real property for sale.

Statement of Jurisdiction

This appeal is within the general jurisdiction of Utah Code Ann. § 78A-4-103(2)(j) and does not involve any matter or issue within the exclusive jurisdiction of the Utah Supreme Court. After opinion the Utah Supreme Court, ordered this appeal transferred to this Utah Appellate Court by order dated May 2, 2008.

Issues Presented for Review and Standard for Review

1. Did the Trial Court abuse its discretion when it concluded:
 - a. “The Court concludes that there was no meeting of the minds on the essential elements of any agreement between the parties.”
 - b. “The parties did not form an oral contract for the work for Ms. Burke’s home.”

Standard for review Whether a contract implied in fact exists is generally considered a question of fact, and we review a trial court's factual findings under the deferential clearly erroneous standard. *See Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 401 (Utah 1998); *Sorenson v. Kennecott-Utah Copper Corp.*, 873 P.2d 1141, 1144 (Utah Ct. App. 1994). However, we "retain[“] the power to decide whether, as a matter of law, a reasonable [fact finder] could find that an implied contract exists." *Ryan*, 972 P.2d at 401 (quoting *Sanderson v. First Sec. Leasing Co.*, 844 P.2d 303, 306 (Utah 1992)). “As our review of this matter is limited to the trial court's factual findings, which we accept as valid, we will be determining whether an implied-in-fact contract exists as a matter of law in light of those findings.” (quoting *Uhrhahn Construction v. Lamar Hopkins* 2008 UT App 41; 179 P.3d 808.)

2. Did the Trial Court abuse its discretion when it allowed the Defendant to offer as proof of payment to the Plaintiff, alleged cash payments totaling \$2,700.00 without corroborating evidence that suggested such payments were actually made?

Standard for review Evidence of payments is a factual determinations that are reviewed for correctness. Marks v. Marks, 1940 UT, 100 P.2d 207 “Accordingly, we hold that an obligee bears the burden of proving that he or she has fulfilled his or her obligations”

3. Did the Trial Court abuse its discretion when it did not state nor explain the evidentiary foundation to support its factual findings? The findings stated by the Trial Court clearly do not support the Trial Court’s conclusion of law, but rather are in conflict with each other, unclear and are argumentative in nature.

Standard for review “we review a trial court's factual findings under the deferential clearly erroneous standard.” *See Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 401 (Utah 1998); Sorenson v. Kennecott-Utah Copper Corp., 873 P.2d 1141, 1144 (Utah Ct. App. 1994). (quoting Uhrhahn Construction v. Lamar Hopkins 2008 UT App 41; 179 P.3d 808.)

4. Was the Trial Court’s award of damages proper given the lack of explicit factual findings regarding such award?

Standard for review "[An] award of damages is a factual determination that we review for clear error." Saleh v. Farmers Ins. Exch., 2006 UT 20, P 29, 133 P.3d 428. (quoting Uhrhahn Construction v. Lamar Hopkins 2008 UT App 41; 179 P.3d 808)

5. Did the Trial Court disregard the evidence that the Defendant's Agent had authorization to approve or disapprove / increase or decrease the scope of repair and renovation work that the Plaintiff was performing on the Defendant's property? As the party charged by the Defendant with authorizing work on the real property at issue, the Defendant is liable to the Plaintiff for work performed on such property at the Defendant's Agent's request.

Standard for review Damages that the Defendant owed the Plaintiff are a factual determination that is reviewed for correctness. (quoting Uhrhahn Construction v. Lamar Hopkins 2008 UT App 41;179 P.3d 808.) "Interpretation of the terms of a contract is a question of law. Thus, we accord the trial court's conclusions regarding the contract no deference and review them for correctness." Nova Cas. Co. v. Able Constr., 1999 UT 69, P6, 983 P.2d 575, (quoting Advanced Restoration v. Priskos, et al., 2005 UT App 505, 539 Ut. Adv. Rep. 66)

Statement of the Case

This case came for trial on the Plaintiff's single cause of action on the foreclosure of a mechanic's lien recorded upon the Defendant's real property, pursuant to which the Plaintiff claimed to have a legal interest in the Defendant's real property and the home thereon. Such mechanic's lien secured the debt of \$28,675 due to the Plaintiff by the Defendant, in consideration of the work performed by the Plaintiff and expenses incurred in connection therewith pursuant to a verbal agreement between the parties.

On or about August 12, 2004, the Defendant filed an Answer to the Plaintiff's Complaint, and included a Counterclaim against the Plaintiff. In such Answer and Counterclaim, the Defendant alleged that the Plaintiff's Complaint was founded upon a wrongful lien pursuant to Utah Code Annotated 38-9-1 Et Seq., and prayed the Trial Court order the mechanic's lien be found to be a wrongful lien and requested that the Defendant be awarded treble damages and attorney fees.

On or about August 4, 2005, the Defendant moved for Summary Judgment claiming that the mechanic's lien contained material misstatements and the Plaintiff's mailing of the lien documents to the Defendant did not disclose the homeowner's rights found under Utah Code Ann. § 38-1-7(2)(h) of the Utah

mechanic's lien statutes. Furthermore, the Defendant prayed the Trial Court order the mechanic's lien be found defective and invalid and the Defendant awarded cost and attorney fees. On or about December 15, 2005, the Trial Court heard oral arguments, and on February 24, 2006, entered the order denying the Defendant's motion on the record.

On or about November 13 and 14, 2007, the case came to trial before the Honorable Parley R. Baldwin. After a two-day bench trial, Judge Baldwin requested the parties submit closing arguments in writing, due to lack of available time of the Court. On or about January 16, 2008, the Trial Court entered its final Judgment and Order into the record.

Such Judgment and Order found in favor of the Plaintiff and awarded the amount of \$7,500. The Trial Court found that the amount of \$5,220 previously paid by the Defendant to the Plaintiff shall be deducted from the awarded \$7,500, leaving a balance of \$2,280 due by the Defendant to the Plaintiff.

The Trial Court awarded the Plaintiff \$2,280 and concluded that there was not a meeting of the minds between the parties, that the parties did not have an oral contract and based upon the supervision of the Defendant's Agent's Utah State Contractor's license, the Plaintiff was not required to be so licensed. The Trial Court also found that each party shall bear their own attorney's fees and cost.

STATEMENT OF FACTS

Rule 52(a), Utah Rules of Civil Procedure, requires that “ ‘[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon’ ” (quoting Utah R. Civ. P. 52(a)).

As the case at hand was tried upon the facts and without a jury, the Plaintiff is arguing the case on appeal upon its merits and challenging the Trial Court’s factual findings and conclusions of law as framed. The Trial Court’s conclusions do not appear to be supported by the evidence and such are legally insufficient, are ambiguous, and do not appear to be based upon law. Furthermore, the Plaintiff believes that the findings and conclusions are contradictory and contain argumentative positions relating to the actions and behavior of the parties.

It is the Plaintiff’s position that neither the Plaintiff nor a reasonable fact finder could justify or support the Trial Court’s findings and conclusions as framed, and therefore fit within the exception to the marshalling requirements detailed within;

Rule 24(a)(9), Utah Rules of Appellate Procedure, Briefs

. . . A party challenging a fact finding must first marshal all the record evidence that supports the challenged finding.

“The only rare exception to the marshaling requirements is if the appellant can show that the trial court’s findings as framed are legally insufficient, i.e., the findings do not provide enough detail to demonstrate the evidentiary basis for the decision thereby allowing for meaningful review,” (quoting, Campbell v. Campbell, 896 P.2d 635, 638 (Utah Ct. App. 1995)) (citation omitted).

In the case at hand the Trial Court’s findings and conclusions are simple cursory statements, which speak more about the parties rather than what is the law and how it governs the actions of the parties. As the Trial Court does not refer to what evidence, facts or law that the Trial Court reviewed to base its decision, the findings and conclusions are insufficient to allow for a meaningful review. Therefore, marshaling the evidence in this case would at best be founded on speculation.

ADEQUACY OF THE FINDINGS

“To successfully challenge the findings, the appellant must ordinarily demonstrate they are clearly erroneous. To make such a showing, appellant is required to marshal all the evidence supporting the findings and then demonstrate that the findings are not supported by legally sufficient evidence” (quoting Campbell v. Campbell, 896 P.2d 635, 638 (Utah Ct. App. 1995)). Also, see the statement in, Williamson v. Williamson 1999 UT APP 219, 983 P.2d 1103 We

agree with Ms. Williamson that she "need not engage in a futile marshalling exercise [because she] can demonstrate the findings, as framed by the court, are legally insufficient." Campbell v. Campbell, 896 P.2d 635, 638 (Utah Ct. App. 1995).

Due to the lack of detail or references to law or evidence within the Trial Court's findings and conclusions, the Trial Court has left the Plaintiff with no-way to marshal the evidence to support the Trial Court's decision and such prevents a meaningful review.

Nonetheless, the legally insufficiencies of findings in this case, show why the conclusions of law are contrary to the facts and cannot be relied upon. Detailed below are the findings that contain contradictory statements as per the evidence and facts they reveal;

The Court states in paragraph:

#2, "After a review of all the evidence, the Court finds that there was no meeting of the minds between the parties."

#3, "The parties did not have a written contract."

#5, "Mr. Isbell is a licensed contractor and was at Ms. Burke's home almost on a weekly basis to review the work performed by the Plaintiff."

#6, “Mr. Isbell provided the adequate supervision over the Plaintiff for the work performed by the Plaintiff.”

#8, “The Court finds that the total value of the labor and materials provided to Ms. Burke, for which she is liable was \$7,500.00.”

#9, “Ms. Burke paid the Plaintiff almost on a weekly basis for the work and materials he provided to Ms. Burke’s home.”

After the Trial Court concluded there was no contract between the parties and no meetings of the minds, the Trial Court must have abused its discretion when it found in favor of the Plaintiff and awarded the Plaintiff a total of \$7,500. One position contradicts the other.

In connection with the above, the Plaintiff claims the conclusions to be captious, ambiguous, and contradictory in facts. If the Trial Court found no contract and no meetings of the minds, then it cannot find the Defendant liable for anything, as there is no enforceable agreement.

Yet, the Plaintiff contends that there was an enforceable agreement between the parties, which the Trial Court must have found, because the Trial Court concluded that the Defendant was liable for a portion of the debt claimed by the Plaintiff.

The Plaintiff's main argument with the Trial Court's conclusions, and that the Trial Court must have found evidence and facts that an agreement existed between the parties, only chose not to enforce it.

**Nevertheless, if the findings are true,
then how could the Trial Court also find that,
the Defendant still owed the Plaintiff?**

Granting the Trial Court its discretion and considering that the findings are true, the award granted the Plaintiff by the Trial Court is wrong and should be returned to the Defendant. Because, if the Trial Court could not find an agreement or a meeting of the minds between the parties, then neither of the parties were obligated to other and the alleged agreement is not enforceable. Better known as an illusory promise.

Nonetheless, the Trial Court does not explain why or how it found that the Defendant still owed the Plaintiff, hence such facts do not allow for a meaningful review. The Trial Court's conclusions are legally insufficient and cannot be relied upon. Therefore, one can only speculate as to what the Trial Court found to issue its decision.

Based on the foregoing facts and because the presiding Judge, the Honorable Parley R. Baldwin has announced that he will retire from the bench on December

31, 2008, the Plaintiff respectfully requests the judgment be vacated and remand for an evidentiary hearing before a new Judge, would be appropriate. At such time, the parties can point to all evidence presented at trial that may go to the findings and conclusions issue. This would further judicial efficiency because otherwise, a new judge would have the onerous task of pouring through the entire transcript, as well as all trial exhibits.

Presented below are the entire conclusions of the Trial Court. It is the Plaintiff's position that the contradictory conclusions are self-evident, and in fact contrary to law. Therefore, it is the Plaintiff's position that the Appellate Court has little choice but to vacate the judgment and remand the case for a new evidentiary hearing.

CONCLUSIONS OF LAW

The Trial Court concluded in paragraph:

#14. The court concludes that there was no meeting of the minds on the essential elements of any agreement between the parties.

#15. The parties did not form an oral contract for the work for Ms. Burke's home.

If paragraph #14 is true, combined with the statement in paragraph #15, then the Trial Court committed a clear error in awarding anything to the Plaintiff (SEE:

FISHER v. CRESTAR BANK, N.A. 2002 UT App 144,). "If a contract is ambiguous, courts may look to extrinsic evidence to clarify the parties' intent." The trial court, after hearing the testimony, found that "even if Sine unreasonably believed that the March 24 letter was an independent obligation of the Bank, there was **no meeting of the minds** between Sine and the Bank," as to the meaning of the letter, and therefore concluded that "as such, it is unenforceable." (Emphasis added).

The Trial Court's conclusions at this point are clear and leave no room for any further interpretation, and based upon other Utah Case Law the Plaintiff's case should have been dismissed right here. Nonetheless, the Trial Court felt compelled to go on, but by doing such the Trial Court created a legal quagmire that weigh heavy upon parties seeking justice. Another Utah case that reflects the Court's standard practice when finding that there is no meeting of the minds is as follows; SEE: Nielsen v. Gold's Gym, 2003 UT 37, P6 78 P.3d 600 "It is fundamental that a meeting of the minds on the integral features of an agreement is essential to the formation of a contract. An agreement cannot be enforced if its terms are indefinite." Richard Barton Enters. v. Tsern, 928 P.2d 368, 373 (Utah 1996) [*7] (citing Pingree v. Cont'l Group of Utah, Inc., 558 P.2d 1317, 1321 (Utah 1976)); Valcarce v. Bitters, 12 Utah 2d 61, 63, 362 P.2d 427, 428 (1961)) (additional

citations omitted); *see also* Candland v. Oldroyd, 67 Utah 605, 608, 248 P. 1101, 1102 (1926) ("So long as there is any uncertainty or indefiniteness, or future negotiations or considerations to be had between the parties, there is not a completed contract. In fact, there is no contract at all.").

Only, with the case at hand, the Trial Court did not say that the agreement seemed ambiguous, or even that the terms within the agreement were misunderstood or uncertain. Therefore, the Trial Court's findings and conclusions are insufficient and cannot to be relied upon.

If the Trial Court reviewed all the facts and evidence concerning the long-term relationship of the parties and the behavior of the parties during the project at issue, then the weight of the evidence clearly demands for a finding that there was a meeting of the minds and there was an agreement to enforce. Assuming these facts as true, we can now look to the next conclusion of the Trial Court.

#16. Based on Mr. Isbell's supervision, the Plaintiff did not need to be licensed for the work he performed on Ms. Burke's home pursuant to the provisions of the Utah Code.

The fact that the Plaintiff did not have a Utah Contractors license while in the employ of the Defendant, this was a question for the Trail Court to find if the Plaintiff's action should be dismissed, because of the facts found within Utah Code

Ann. § 58-55-604. **Proof of licensure to maintain or commence action.**

Paragraph #16 explains that the Trial Court has concluded, NO. Therefore, the Trial Court found the Plaintiff's lack of proper licensing was not a factor and the action could move forward.

Only that is not all the facts that this conclusion states. The Trial Court found the Plaintiff met the requirements of Utah Code Ann. § 58-55-604. How did the Trial Court find that the Plaintiff met such requirements? The Trial Court found that **"Based on Mr. Isbell's supervision."** Who is the Mr. Isbell? Mr. Isbell is the Defendant's Agent and the Defendant's husband. The Trial Court found that the Defendant's Agent was on location supervising the work...

This statement is exactly on point and makes the Plaintiff's entire argument. If the Defendant's Agent was making regular visits to the job, and supervising the job, then the Defendant had full knowledge of the Plaintiff's efforts and knew or should have known the Plaintiff expected payment for services rendered. This fact stands all by its self and speaks volumes about how the Trial Court's findings and conclusions are against the weight of the evidence and are in clear error.

"Additionally, Landlord behaved as if Tenant was his agent in contracting with Advanced. It is undisputed that the Landlord knew of the repair work while it was being completed and did not object." (quoting Advanced Restoration v. Priskos, et

al., 2005 UT App 505, 539 UT. Adv. Rep. 66).

Thus, the Trial Court's conclusion, "**that there was no meeting of the minds**" and "**The parties did not form an oral contract,**" is a clear error. The foregoing stated action of the Defendant's Agent places the liability for the entire debt upon the Defendant, as stated in:

Utah Code Ann. § 38-1-3 (1994) **Those entitled to lien -- What may be attached.** ... ~ whether at the instance of the owner or of any other person acting by his authority as agent, contractor, ~ ...

(Emphasis added)

The Plaintiff's mechanic's lien is supported by the implied agreement between the parties, and the Defendant's interest was protected by on location supervision and oversight. Therefore, the Plaintiff's mechanic's lien is enforceable under the law as detailed within;

Utah Code Ann. § 38-1-2 (2002), "**Contractors**" and "**subcontractors**" defined.

Any person who does work or furnishes materials by contract, **express or implied**, with the owner, as provided in this chapter, shall be considered an original contractor, and all other persons doing work or furnishing materials shall be considered subcontractors. (Emphasis added).

The simple mis-step, by the Trial Court concerning the evidence of the relationship and behavior of the parties caused the Trial Court's findings and conclusions to be legally insufficient and cannot to be relied upon.

#17. Pursuant to the mechanic's lien the Plaintiff recorded with the Weber County Recorder's Office and the Complaint to foreclose that mechanic's lien the Plaintiff filed with the court, he is entitled to recover \$2,280.00 for the work he provided to Ms. Burke, for which he was not compensated during the time the work was performed on Ms. Burke's home.

The key fact in this conclusion is, **"for which he was not compensated."** Again, a statement that can alone, and such proves that the parties created a contract and the Defendant was making payments to the Plaintiff. Payments are an affirmation of a debt. Therefore, the findings by the Trial Court are legally insufficient and cannot be relied upon.

It remains undisputed by the parties, that they had known each other for years (SEE: D17). Furthermore, the Trial Court was aware (by testimony) that the parties had previously engaged in projects together and had a working knowledge of the expectations placed upon the other.

Therefore, the parties did in fact enter into an agreement with full knowledge of the expectations. How the Trial Court could not have considered this most crucial

piece of evidence is without explanation.

Restating the same fact, the parties knew each other very well and an oral agreement was their regular form of practice, and the parties had repeated this same behavior repeatedly. Only this time, the Defendant's greed overrode the financial commitment to the Plaintiff. This is not the fault of the Plaintiff's.

The Defendant was an absentee property owner and did not stay abreast of the condition of her property. Accordingly, it was significantly damage by previous tenants. At the time, the Plaintiff commenced work on the property at the Defendant's and Defendant's Agent request, the deplorable condition of the Defendant's real property remains undisputed (SEE: D17 ¶2).

Relevant Facts

The Presiding Trial Court Judge has announced that he will take his retirement on or about December 31, 2008. Therefore, this case is without a presiding Judge who has any knowledge of the facts surrounding the case at hand and able to make any additional findings upon a reverse or remand. Therefore, it is appropriate that this court vacate the judgment and remand for a new evidentiary hearing.

-
- The findings of facts, conclusion of law and final order, are ambiguous as to the facts relied upon and the conclusions are confusing, contradictory and in conflict with one another.
 - The damages awarded the Plaintiff are not based on facts and are not founded upon the evidence, or supported by law.
 - The damages NOT awarded the Plaintiff are not based on facts and are not founded upon the evidence, or supported by law.
 - The Trial Court's limiting the amount owed by the Defendant to the Plaintiff, because the Defendant did not authorize the projects personally, was an abuse of discretion. The Defendant appointed her husband as the Defendant's Agent, work requested or approved by the Defendant's Agent is the obligation of the Defendant, therefore the Plaintiff is entitled to the full

compensation due to him.

- The meeting of the minds is clear and evident based upon the continuous behavior of the parties throughout the 5 ½ months long project.
- The Trial Court acceptance of the Defendant's unsupported alleged cash payments and the checks that are not in evidence is an abuse of discretion by the Trial Court. It is a well-established fact that payment is a defense, but the obligee bears the burden of proving that, he or she fulfilled his or her obligation. The Defendant did not prove that point. "It is well settled that payment is an affirmative defense, and that the party claiming payment has the burden of proving it." (quoting Marks v. Marks, 1940 UT, 100 P.2d 207)
- The Plaintiff has prepared a spreadsheet that compares Defense Exhibit D14 (shown below), with the facts in evidence. The Plaintiff's spreadsheet follows on the next page, and shows that the Defendant misrepresented evidence to the Trial Court upon which it relied.

PAYMENTS MADE TO MARK

DATE	DESCRIPTION	PAYMENT METHOD	AMOUNT
2003-02-16	To get started on clean-up.	Wells Fargo Ck# 1653	\$150.00
2003-02-28	Balance of clean-up.	Wells Fargo Ck# 1457	\$100.00
2003-04-22	Advance for work to be completed.	Cash	\$500.00
2003-05-02	Draw Request from Mark.	Zions Bank Ck# 225	\$200.00
2003-05-12	Draw Request from Mark.	Zions Bank Ck# 260	\$150.00
2003-05-28	Draw Request from Mark.	Cash Transfer to Mark's Zions Account	\$300.00
2003-06-04	Draw Request from Mark.	Zions Bank Ck# 351	\$350.00
2003-06-07	Draw Request from Mark.	Golden West Ck# 13348	\$500.00
2003-06-07	Draw Request from Mark.	Check to Josh Bergman. Gave \$200.00 to Mark.	\$200.00
2003-06-29	Draw Request from Mark.	Golden West Ck# 13311	\$250.00
2003-07-05	Draw Request from Mark.	Cash	\$600.00
2003-07-12	Draw Request from Mark.	Cash	\$200.00
2003-07-22	Draw Request from Mark.	Cash Transfer to Mark's Zions Account	\$300.00
2003-08-03	Draw Request from Mark.	Zions Bank Ck# 506	\$500.00
2003-08-23	Draw Request from Mark.	Cash	\$600.00
2003-09-02	Draw Request from Mark.	Zions Bank Ck# 597	\$320.00
			<u>\$5,220.00</u>

State ☐ City ☐ Plaintiff ☐ Defendant ☒
 Exhibit D14
 Name Bergman v. First American
 Case # 040902444
 Date Received 11-13-01

Using Defense Exhibit D13 (copies of checks), and comparing such to Defense Exhibit D14 (summary of payments), a person finds a difference of \$3,900 less than claimed and deducted from the Plaintiff's award. SEE: spreadsheet below:

Defense Exhibit D13 provides the evidence for only four (4) payments

The Plaintiff has removed all cash payments as such are unproven

DATE		DESCRIPTION		PAYMENT METHOD		AMOUNT
12-May-03		PAYMENT		ZIONS BANK CK# 260		\$150
4-Jun-03		PAYMENT		ZIONS BANK CK# 351		\$350
29-Aug-03		PAYMENT		ZIONS BANK CK# 506		\$500
2-Sep-03		PAYMENT		ZIONS BANK CK# 597		\$320
				TOTAL OF PAYMENTS		\$1,320
TOTAL OF ALLEGED PAYMENTS PAID TO MARK AS PER DEFENSE EXHIBIT D14						\$5,220.00
				AMOUNT TOTAL DIFFERENCE		\$3,900.00

**THUS, FOR THIS APPELLATE COURT TO VACATE THE
JUDGMENT AND REMAND IS APPROPRIATE**

Summary of Argument

The Plaintiff's argument is founded upon Utah mechanic's lien statutes, quantum meruit, a contract implied-in-fact, value added to the Defendant's real property, the behavior of the parties, the Defendant's Agent supervised the work, the length of the project, and the Defendant's defenses are all unsupported by evidence.

It is well established that the Plaintiff started a project for the Defendant on or about May 10, 2003, and finished on or about October 4, 2003. It is therefore completely irrelevant that the Defendant is claiming (now that the work is complete) that the total amount of work is valued at \$7,500. However, should we assume this is true, a simple mathematical evaluation shows such does not reach the Utah's Minimum Wage Act. Thus, such would look like the following:

Total Plaintiff claimed spent on materials	\$4,675.00
Total of materials claimed as not approved by Defendant SEE D15	<u>-\$1,791.84</u>
	= \$2,883.16
Total (awarded Plaintiff) value of work as claimed by the Defendant	\$7,500.00
	<u>-\$2,883.16</u>
	= \$4,616.84
Reflects the true total amount of payments as proven by D13	<u>-\$1,320.00</u>
	= \$3,296.84
Total number of hours claimed by Plaintiff	<u>/1,200hrs</u>
Plaintiff's Hourly wage for the project	= \$2.74

A contract is valid and enforceable when two competent parties offer something of consideration to each other. In this case, the Plaintiff provided labor and materials, which increased the value of the Defendant's home and property. In turn, the Plaintiff expected payment for the services provided. The parties are competent, and therefore can enter into a binding agreement.

The Defendant should have known or knew that the services the Plaintiff was providing would cost the Defendant and the Plaintiff had every right to expect payment for the services he provided.

The Defendant claims that she asked the Plaintiff to stop work several times but the Plaintiff refused (SEE: exhibit D17 and Defendant's Closing arguments (page

15, last sentence)). Yet, neither the Defendant nor the Defendant's Agent offered anything to prove this fact. However, their actions and behavior proved just the opposite.

The Defendant answered the Plaintiff's Complaint, stating that the Plaintiff's mechanic's lien was a wrongful lien, yet the Defendant never presented any evidence to that end.

The Defendant affirmed the debt and contract, when on or about August 3, 2003, after receiving a detailed billing statement from the Plaintiff for \$13,000, the Defendant issued a check to the Plaintiff in the amount of \$500.00 with a promise to pay more very soon, with hopes to keep the Plaintiff working on the Defendant's project (SEE: D14).

The Defendant claims that the payments that the Defendant made to the Plaintiff were small because the Defendant could not afford any more as they had three house payments to make each month.

It is undisputed that the Defendant's property was a disaster when the Plaintiff started the project and that the Plaintiff did a great job (SEE: D17).

Detail of the Argument

The Trial Court's findings of fact state that the Defendant and or the Defendant's Agent visited the project at least once a week during the entire project. Accordingly, by her own admission, the Defendant had ample time to observe the Plaintiff at work on the property, to ask questions of the Plaintiff concerning the Plaintiff's expenses and work hours, yet there is nothing in evidence to show that the Defendant ever inquired or was concerned with such expenses or hours.

The Defendant submitted no evidence documenting that the Defendant ever asked the Plaintiff to stop working on the property at issue. Thus, any argument concerning such is moot. The Defendant's Agent is a licensed Utah Contractor, therefore it is safe to say that he is viewed as a professional by the public and the industry.

Established as a professional, the Defendant's Agent is well aware of how to stop someone from working on a project that as claimed by the Defendant and the Defendant's Agent both asked the Plaintiff to stop working. First, you can fire the worker, you can call the police and report trespassing, and you can call the Utah State Contractors licensing Department amongst other things. Only, the Defendant claims that the Plaintiff would not stop working, and that the Plaintiff would even call and tell the Defendant that they now owe more money because of work

recently completed.

Because the Trial Court's findings are so vague and do not explain what evidence it relied upon to make its findings, one cannot know for sure if the Trial Court gave this claim of the Defendant any weight. However, if the Trial Court did, it allowed it's self to be lead away from the merits of the case. As the Defendant did not produce a single piece of evidence that proved any part of this claim.

Through out the project due to the supervision and oversight, the Plaintiff understood that the work he provided was requested and approved, and since there is no evidence to the contrary, all work the Plaintiff performed was authorized and approved by the Defendant and or by the Defendant's Agent. If the Defendant's Agent failed to inform the Defendant of what he had authorized the Plaintiff to do, this cannot reflect upon what the Plaintiff is due by the Defendant.

Based on the fact that the parties had known each other for several years (SEE: D17), and the fact that the Defendant's Agent hired the Plaintiff for several other jobs in the past, the Defendant has no foundation to now claim that she did not agree to the Plaintiff's standard wage of \$20.00 per hour. The fact the Defendant or the Defendant's Agent never requested an hourly break down before or during the project, the Plaintiff cannot be expected to provide one now. It is rather

disingenuous of the Defendant to try to change the terms now they do not suit her.

The Defendant has stated in the pleadings and affidavits that the parties agreed to hire the Plaintiff to work on the real property. Therefore, the Plaintiff is entitled to receive financially compensated for the work.

The only argument the Defendant could have against owing the full amount to the Plaintiff is if the Defendant intended to defraud the Plaintiff by requesting the Plaintiff to perform services for which the Defendant never intended to compensate the Plaintiff for performing. As the Court is aware, intent to commit fraud is not a valid argument. That is why a mechanic's lien law exists – to enforce payment when parties renege on their commitment to do so.

The Defendant paid the Plaintiff \$500 on August 3, 2003 (SEE: D14), after receiving a detailed bill for \$13,000 from the Plaintiff on that same day. SEE: (Defendant's closing arguments (page 7, "response")). With this payment, the Defendant has affirmed the debt for a minimum of \$13,000, and then reaffirmed the debt again with the payment made on September 2, 2003, for \$320 (SEE D14). Thereby, the Defendant has affirmed the debt and that a contract existed between the parties.

It has not been disputed that the market value of the home and real property when the Plaintiff began the repairs and renovation was between \$60,000 and

\$70,000. When the Plaintiff completed the repairs and renovation on the property, it was listed with the Defendant's Listing Agent for as much as \$115,900.

Therefore, there was, at a minimum, an increase in value of \$45,900 to \$55,900 from the Plaintiff's work based on the final listing price. The Defendant became significantly unjustly enriched due to the Plaintiff's efforts. SEE: (Plaintiff's Closing arguments (page 6 ¶3)).

Conclusion and Statement of Relief Sought


For the foregoing reasons, the Trial Court's findings are found as contradictory and unclear as to their true meaning, and that such are insufficient to reach the Trial Court's conclusions. In addition, based upon the actions, behavior of the parties, the Defendant's Agents oversight is the second cause of the Defendant's liability due the Plaintiff, there was an enforceable agreement established, and the Trial Court needs to find the true value of the services provided. Thus, a judgment can be rendered.

Therefore, the Trial Court's conclusions of law, as framed, should be found as legally insufficient, a clear error, and such do not allow for a meaningful review and cannot be relied upon. Thereby, it is appropriate for such to be vacated and the case remanded for a new evidential hearing.

Furthermore, the alternative security released by the Trial Court to the Defendant be placed into the Trial Court's escrow, securing the Plaintiff's mechanic's lien at issue, with the exception of the \$2,280.00 that was released to the Plaintiff.

That should the Plaintiff prevail in this appeal, the Defendant is ordered to pay the Plaintiff's legal cost and expenses which the Plaintiff incurred, together with interest on any amount found to be due the Plaintiff by the Defendant.

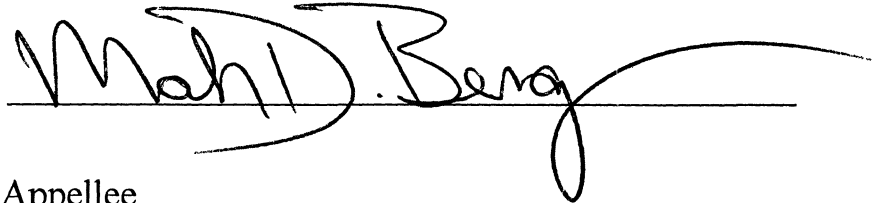
Respectively submitted,

 Dated November 5, 2008

CERTIFICATE OF SERVICE

I CERTIFY THAT ON THE 5 DAY OF November, 2008 THE
FOREGOING Case Brief----- WAS SERVED ON THE DEFENDANT/
Appellee BY MAILING A TRUE AND CORRECT COPY VIA FIRST-CLASS
U.S. MAIL, POSTAGE PREPAID TO THE FOLLOWING ADDRESS;

Respectfully,

A handwritten signature in black ink, appearing to read "Michael E. Bostwick", written over a horizontal line.

Atty. For the Defendant/ Appellee

Michael E. Bostwick

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Salt Lake City, UT. 84121