

1988

Michael J. Hoth, Jeffrey R. Hoth, dba Hoth
Brothers, a Utah partnership v. Karl R. White and
Amy H. White, husband and wife : Reply Brief

Utah Court of Appeals

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BRIEF

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DOCKET NO.

IN THE UTAH COURT OF APPEALS

~~88-0308~~

MICHAEL J. HOTH, JEFFREY R.)
HOTH, dba HOTH BROTHERS, a)
Utah partnership,)

Plaintiffs,)

vs.)

KARL R. WHITE and AMY H.)
WHITE, husband and wife,)

Defendants.)

APPELLANTS' REPLY BRIEF

KARL R. WHITE and AMY H.)
WHITE, husband and wife,)

Third Party Plaintiffs)
and Respondents,)

Case No. 880308-CA

vs.)

DEAN R. MORGAN, CHARLES R.)
TEAM, DEAN R. MORGAN dba)
POLAR BEAR HOMES, and CHARLES)
R. TEAM dba TEAM REALTY,)

Third Party Defendants)
and Appellants.)

APPEAL FROM A FINAL JUDGMENT BY THE
HONORABLE TED S. PERRY, FIRST CIRCUIT COURT
OF THE STATE OF UTAH, LOGAN CITY DEPARTMENT
(WHICH COURT WAS KNOWN AT THE TIME OF THE
ENTRY OF SAID JUDGMENT AS THE SECOND CIRCUIT
COURT OF THE STATE OF UTAH IN AND FOR
COUNTY OF CACHE, LOGAN CITY DEPARTMENT)

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Priority No. 14(b)

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R. TEAM dba TEAM REALTY,)	
Third Party Defendants)	
and Appellants.)	

SUMMARY OF ARGUMENTS

1. Standard of Review for Findings of Fact.

Throughout Respondent's Brief, reference is made to the case of Bennion v. Hansen, 699 P.2d 757 (Utah 1985), in support of an incorrect standard of review by the Appellate Court with respect to the trial court's findings of fact. The correct standard of review has been enunciated by the Utah Supreme Court in its subsequent decisions of State of Utah v. Bryan Walker, 743 P.2d 191 (Utah 1987), and Western Kane

County Special Service District No. 1 v. Jackson Cattle Company, 744 P.2d 1376 (Utah 1987). Pursuant to these more recent decisions, if the trial court's findings of fact are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings shall be set aside on appeal.

2. Standard of Review With Respect to Conclusions of Law. While findings of fact will not be set aside ordinarily unless they are clearly erroneous, conclusions of law are simply reviewable on appeal for their correctness, without any special deference.

3. The Trial Court's Findings of Fact and Conclusions of Law. In this case, both the trial court's findings of fact and conclusions of law are clearly erroneous, and upon application of the correct standard of review on appeal, require reversal herein.

ARGUMENT

I

RESPONDENT INCORRECTLY DEFINES THE
STANDARD OF REVIEW REQUIRED BY UTAH
RULES OF CIVIL PROCEDURE FOR FINDINGS OF
FACT BY THE TRIAL JUDGE.

At pages 16 and 17 of Respondent's Brief, Respondent argues that the universally recognized and established rule in this state, pursuant to Rule 52(a) Utah Rules of Civil Procedure and Bennion v. Hansen, supra, is that "findings of the trial court will not be disturbed unless there is no

record of evidence to support them, viewed in a light most favorable to the trial court's ruling." However, effective January 1, 1987, a new Rule 52(a) became effective in this state, and in its 1987 decisions of State of Utah v. Bryan Walker, supra, and Western Kane County Special Service District No. 1 v. Jackson Cattle Company, supra, the Utah Supreme Court clearly specified the interpretation and application of Rule 52(a), specifically noting in Walker that:

We disavow language in our earlier cases describing or implying a standard under new Rule 52(a) which differs in any significant respect from the standard of review applied in this case.

Noting that the language of Rule 52(a) is similar to the Federal Rules of Civil Procedure, and that federal case law has defined the standard of review under the Federal Rule, the Utah Supreme Court in Walker cited a prominent federal authority as summarizing that standard as follows:

It is not accurate to say that the appellate court takes that view of the evidence that is most favorable to the appellee, that it assumes that all conflicts in the evidence were resolved in his favor, and that he must be given the benefit of all favorable inferences. All of this is true in reviewing a jury verdict. It is not true when it is findings of the court that are being reviewed. Instead, the appellate court may examine all of the evidence in the record. It will presume that the trial court relied only on evidence properly admissible in making its finding in the absence of a clear showing to the contrary. It must give great weight to the findings made and the inferences

drawn by the trial judge, but it must reject his findings if it considers them to be clearly erroneous. Wright & Miller, Federal Practice & Procedure, page 2585 (1971).

The Utah Supreme Court then continues in Walker by citing the case of United States v. United States Gypsum Company, 333 U.S. 364, 395 (1948), as defining the term "clearly erroneous" to mean:

A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

The Utah Supreme Court concludes in Walker that the content of the Utah Rule 52(a) "clearly erroneous" standard, imported from the Federal Rule, requires that if the findings are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings will be set aside. Similarly, under similar rules, courts in other jurisdictions have also concluded that the finding of the trial court is not necessarily binding upon an appellate court when it clearly appears from the whole record that such finding is wrong; and, that the power of a court of review ought not to be left paralyzed, so as to prevent a miscarriage of justice merely by the erroneous findings of the trial court. Thuringer v. Trafton, 58 Colo. 250, 144 P. 866; Ortega v. Koury, 55 N.M. 142, 227 P.2d 941.

Notwithstanding the trial court's findings of fact, if the evidence clearly preponderates in the other direction, the appellate court should substitute its judgment for that of a trial judge sitting without a jury. In this case, the appellate court should review the record as a whole, and as set forth and referred to in Appellant's Brief, to see that, in fact, the preponderance of the evidence clearly shows that there was essentially no dispute over the original contract price for the framing subcontract, or the amount remaining unpaid thereon, and the only real dispute was over extra work agreed to directly between the owners and subcontractors in light of the claimed offsets by the owners against the subcontractors, where the trial court specifically found the subcontract to have been substantially completed.

II

TRIAL COURT'S CONCLUSIONS OF LAW ARE
REVIEWABLE FOR CORRECTNESS, WITHOUT ANY
SPECIAL DEFERENCE.

In order to correctly apply the standard of review by the appellate court, a distinction must be made between its review of the findings of fact by the trial court, and its review of the trial court's conclusions of law. Citing its earlier decision in State v. Walker, supra, with approval, the Utah Supreme Court explained this distinction in its decision in Western Kane County Special Service District

No. 1 v. Jackson Cattle Company, supra, (Utah 1987), by indicating:

While findings of fact will not be set aside unless they are clearly erroneous, conclusions of law are simply reviewable for correctness without any special deference.

Although findings of fact would not be set aside unless clearly erroneous (as discussed above herein), sufficiency of the evidence is a question of law, subject to review as such by an appellate court. Howard v. Burlington, 399 Mass. 585, 506 N.E.2d 102 (1987). In this case, then, the appellate court should review and determine the propriety of the trial court's conclusions of law, as well as review the sufficiency of the record and evidence as a whole, without benefit of any special deference or presumption in favor of the Whites.

III

THE TRIAL COURT'S FINDINGS OF FACT ARE CLEARLY ERRONEOUS, AND ITS CONCLUSIONS OF LAW ARE INCORRECT, REQUIRING REVERSAL ON APPEAL.

As indicated in lines 7 through 22, page 994 of the Transcript, and by the Court's "Finding of Fact No. 13", the trial court found that Morgan had paid himself \$3,007 "at the time the Hoths were to be paid", in January, 1987, plus \$2,000 to "eames at such time, and that had those amounts been paid to the framing subcontractors, no lien would have been filed and "he [Morgan] would never be in this lawsuit today", and this suit would have been unnecessary.

Moreover, the trial court continued, Morgan's failure to make such a payment to the framing subcontractor for the balance of their contract constituted a breach of contract between Morgan and Whites.

As discussed in the Appellants' Brief, there was no testimony or evidence that Morgan's failure to pay Hoths in January of 1987 would constitute a breach of his contract with Whites. The agreement between Whites and Morgan itself does not support such a conclusion where Whites directly paid Morgan certain funds for construction costs, and indeed all of those monies (as shown by the record and discussed in the Appellants' Brief) were paid over by Morgan to meet construction creditors' claims, which if left unpaid would have permitted multiple mechanic's liens to have been filed. If Morgan had paid Hoths in January of 1987, before the framing subcontract was completed, it would likely have compromised the owner's claims for offset, and suit would still have to be brought to recover them. Moreover, as indicated by paragraphs 10 and 11 of Whites' counterclaim, it was the owner's contention that the framing subcontractors were not to have been paid any more money until permanent financing had been obtained by Whites for the property.

When the trial court ignored the detailed accounting testimony given by Morgan on the last day of trial, accounting for all monies paid to him on this project and

clearly showing their application to legitimate construction costs; and when the court determined that no other liens would have been filed and that this litigation would have been rendered unnecessary by Morgan's payment to Hoths in January of 1987 (instead of paying the other claims which Morgan testified to have paid with those funds at that time), the trial court engaged in pure illogical supposition without any factual basis or relevancy in these proceedings. Consequently, its findings are not supported by the clear weight of the evidence, and are reversible as clearly erroneous.

Similarly, after learning of this appeal, the trial court's modification of its findings to specifically find the existence of a partnership or joint venture; and its conclusion that Morgan had a duty to keep the property lien-free after he could no longer control the finances or labor performed on the project; and the conclusion that the general contractor should indemnify the owners for the balance of the undisputed framing subcontract, as well as for extras performed per agreement between the owners and the subcontractors without his involvement (especially where the court has already given the owners the benefit of their claims against the subcontractor by offset); plus awarding the owners indemnity for all attorney fees in this matter, are conclusions of law which are blatantly incorrect, and which are reviewable for accuracy by this Court with no

special deference being accorded thereto. The specific nature of the errors committed by the trial court in its findings of fact and conclusions of law are more specifically set forth and documented in the Appellants' Brief herein, and should be reviewed in the context of the correct appellate standard for review, depending upon whether the error occurred as a finding of fact, or as a conclusion of law, as those appellate standards of review are set forth hereinabove.

Finally, pursuant to Rule 15(b), Utah Rules of Civil Procedure, Morgan moved to amend his pleadings to conform to the evidence tried in this proceeding, and to clearly state his counterclaim for out-of-pocket losses and fees. Although the court granted the motion over White's objection, Whites have not appealed with respect thereto, except by oblique reference in Respondents' Brief, page 3. Failure by the trial court to make any findings or conclusions whatsoever with respect to such counterclaim also constitutes reversible error with respect to which this Court is respectfully requested to enter findings and conclusions in accordance with the law, or remand the case on such issues for appropriate determination.

CONCLUSION

Contrary to the position taken by the Whites in the Respondents' Brief, wherein it is asserted that the trial court's findings will not be disturbed unless there is no

record of evidence to support them, viewed in a light most favorable to the trial court's ruling, the recent decisions of the Utah Supreme Court clearly indicate a different standard of review should be applied upon appeal. The correct standard to review the trial court's findings of fact is one in which, although there is evidence to support the trial court, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.


With respect to the conclusions of law determined by the trial court, a separate and distinct standard of review is applicable. The Utah Supreme Court in its recent decision has defined that standard to be one in which this Court must simply review the correctness of the trial court's conclusions of law, without any special deference or presumption of accuracy. In this case, as a matter of law, there is not sufficient evidence to support the trial court's findings to which Appellants have taken exception; nor are the trial court's conclusions of law correct, to the extent that Appellants have appealed therefrom. Regardless of who the general contractor is, the court's conclusion that the general contractor should be responsible to pay the framing subcontractor the balance of the framing subcontract (essentially allowing the owners to obtain the benefit thereof for free, to that extent), and its further conclusion of law that the contractor should be responsible

for the costs of extra work performed by the framing subcontractor at the request of the owner, are clearly incorrect conclusions of law which should be reversed. Similarly, it is improper for the trial court to require, as a matter of law, that the contractor should be required to pay all of the attorneys' fees in this matter, particularly where most of the trial time and expense related to the resolution of the controversy between the subcontractor and the owners over the additional work performed by the subcontractor, and the asserted offsets by the owners.

Failure to make any findings of fact or conclusions of law with respect to Morgan's counterclaim also constitutes reversible error. This Honorable Court should, sua sponte or on remand, provide for appropriate determinations to be made with respect to said counterclaim.

Dated this 17th day of January, 1989.

HILLYARD, ANDERSON & OLSEN



DALE G. SILER
Attorney for Third-Party
Defendants and Appellants

CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing APPELLANTS' REPLY BRIEF were mailed, postage prepaid, to Kevin E. Kane, Attorney for Respondents, at 108 North Main, Suite 200, Logan, Utah 84321, this 17th day of January, 1989.

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Dale G. Siler