

1978

Dale Rucker v. Arlin Dalton : Brief of Plaintiff and Appellant Dale Rucker

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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DALE RUCKER, :
Plaintiff and Appellant, :
vs. :
ARLIN DALTON, : Case No. 16082
Defendant and Respondent. :

-----oooOooo-----

BRIEF OF PLAINTIFF AND APPELLANT DALE RUCKER

Appeal from the Judgment of the Fourth Judicial District Court
for Utah County,
Honorable Allen B. Sorensen, Judge

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FILED

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Clerk, Supreme Court, Utah

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DALE RUCKER, :
Plaintiff and Appellant, :
vs. :
ARLIN DALTON, : Case No. 16082
Defendant and Respondent. :

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BRIEF OF PLAINTIFF AND APPELLANT DALE RUCKER

NATURE OF THE CASE

This case was brought by appellant to recover damages for defective workmanship of respondent arising out of a contract in which respondent was to construct an addition to a residence owned by appellant.

DISPOSITION IN LOWER COURT

The case was tried without a jury before the Honorable Allen B. Sorensen, Judge, on August 24, 1978, the Judge having determined the matter to be an equitable proceeding. Appellant was granted judgment against respondent for plumbing deficiencies in the sum of \$2,000.00, as well as court costs in the sum of \$114.80. Respondent's Counterclaim was dismissed, no cause of action. Appellant was not granted judgment for structural deficiencies in

the addition to the residence.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the trial court's Findings of Fact, Conclusions of Law, and Memorandum Decision with respect to the structural deficiencies and the institution of a corresponding increase in the judgment by this Court in favor of appellant of \$9,490.00 to a total judgment of \$11,490.00.

STATEMENT OF FACTS

In the summer of 1976, appellant, a retired high school auto mechanics instructor, approached respondent who misrepresented himself to be a licensed general contractor, and inquired about the possibility of respondent constructing an addition to a residence owned by the appellant. Appellant provided respondent with drawings of the floor plan for the addition. Respondent took the drawings and prepared a quotation, including material and labor required to construct the addition.

Respondent's quotation being the lower of two quotations received by appellant, the appellant on July 19, 1976 accepted respondent's offer. The written agreement entered into by the parties called for a total contract price of \$11,247.50, which was to be paid in installments.

The respondent selected an excavation company to dig the

basement, contacted it to make arrangements for the digging, and construction on the addition began. The appellant was not consulted on the selection of the excavation company, nor in the decision upon how much it was to be paid.

The respondent hired other employees to do work on the job, determined how much and when they were to be paid, without any consultation with the appellant. With respect to both the foundation and the lumber used in the project, the respondent was responsible for all decisions without consultation with the appellant.

Appellant paid respondent \$11,050.00, leaving a balance owed on the contract of \$197.50, which balance appellant refused to pay until respondent completed the work by correcting the deficiencies in the home addition. Respondent refused to correct the deficiencies despite repeated requests by appellant.

Appellant did not hire or pay any subcontractors for work included in the contract. Payments to respondent did not represent an hourly wage, but represented payments on the total contract price included in the agreement of July 19, 1976. Appellant never withheld income taxes or social security taxes from any payments made to respondent, nor did respondent ever submit time cards of hours worked to appellant.

Appellant did not own or supply any of the tools used in

the construction of the addition. Appellant did not control the day to day activities of either the respondent or respondent's subcontractors. Respondent acknowledges that some general direction by an owner is to be expected.

The parties agreed, and the contract so stated, that electrical work in the addition was not included in the contract. The parties also agreed orally that the heating work was likewise not included in the contract.

The addition constructed by respondent contained several structural deficiencies. Many of those deficiencies were itemized in certified letters sent to the contractor, respondent, and to the owner, appellant, by the Provo Building Inspection Section, dated June 21, 1977. Shelby Adams, a building inspector for Provo City, testified that the City has not and will not approve the addition until all the deficiencies itemized in the June 21, 1977 letter are corrected.

Thomas Wayne Smith, a building contractor licensed by the State of Utah for eight years testified that he examined the addition on the residence owned by appellant, and that he observed numerous structural deficiencies. He formed an opinion as to the cost of the repair of those deficiencies so that the building would conform to the building code, and he submitted to appellant his estimate as to that cost. He testified that his estimate of \$9,490.00 did not include

plumbing repairs with the single exception of a \$500.00 estimate to repair a sewer line to fit and comply with the code.

ARGUMENT

POINT I.

IN ITS ENTIRETY, THE AGREEMENT BETWEEN THE PARTIES CREATED AN EMPLOYER-INDEPENDENT CONTRACTOR RELATIONSHIP AS A MATTER OF LAW

The general rule for determining whether or not an individual was acting as an employee or as an independent contractor is stated in 41 Am. Jur. 2d Independent Contractors § 5, pp. 744-745:

" . . . it has generally been held that the test of what constitutes independent service lies in the control exercised, the decisive question being who has the right to direct what shall be done, and when and how it shall be done. It has also been held that commonly recognized tests of the independent contractor relationship, although not necessarily concurrent or each in itself controlling, are the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price, the independent nature of his business or his distinct calling, his employment of assistants with the right to supervise their activities, his obligation to furnish necessary tools, supplies, and materials, his right to control the progress of the work except as to final results, the time for which the workman is employed, the method of payment, whether by time or by job, and whether the work is part of the regular business of the employer."
[Emphasis added]

In accord with the general rule discussed above, this Court has laid down guidelines for determining whether a party acted in the capacity of an employee or an independent contractor. In Harry L. Young and Sons, Inc. vs. Ashton, 538 P.2d 316, (Utah, 1975), this Court in holding a truck driver to be an employee for purposes of workmen's compensation benefits, said the following:

"Speaking in generality: An employee is one who is hired and paid a salary, a wage, or at a fixed rate, to perform the employer's work as directed by the employer and who is subject to a comparatively high degree of control in performing those duties. In contrast, an independent contractor is one who is engaged to do some particular project or piece of work, usually for a set total sum, who may do the job in his own way, subject to only minimal restrictions or controls and is responsible only for its satisfactory completion."
[Emphasis added] [At 318]

In Foster vs. Steed, 19 Utah 2d 435, 432 P.2d 60 (1967), this Court in holding that a master-servant relationship did not exist between an oil company and service station operators, quoted the following language from 83 A.L.R.2d 1284, Anno: Gasoline Dealer--
Status:

"In general, the determinative question has usually been posed as one of 'control', the view being that if the defendant controls, or has the right of control, the manner in

which the operations are to be carried out, the defendant is liable as a master, while, if the control extends only to the result to be achieved, the actor is regarded as an independent contractor,..." [Emphasis added] [At 62]

In Whyte vs. Christensen, 550 P.2d 1289 (Utah, 1976), this Court made clear that the above-described test for determining the employer-independent contractor relationship was applicable in a residential construction project. In Whyte, supra, this Court reviewed certain jury instructions given by the trial court in aiding it to make a determination of the relationship between the defendant homeowner and plaintiff worker. The questions which were to be considered together by the jury in its determination were as follows:

"1. Did the defendant have the right to control the work of the plaintiff.

• • •

2. Did the defendant have the right to terminate David Whyte or any other craftsman at any time he saw fit?

3. Was the plaintiff working for wages at an hourly rate, and did the defendant on prior occasions pay him his wages based on an hourly rate?

4. Did the defendant have the right to make additions to the alterations to his home, or to subtract at any time from instructions given on a prior occasion?" [Id., at 1290]

In Whyte, supra, the defendant had hired a fellow post office employee to assist him in the construction of an addition to his residence. The defendant had little experience in construction

work, but the plaintiff had substantial experience as a carpenter and builder, although he was not a licensed contractor. However, at this point, any similarity between Whyte, supra, and the instant case ends. In Whyte, supra, the plaintiff builder was to be paid at a flat hourly rate, as were his two sons who assisted in the construction work. In Whyte, supra, the homeowner was responsible for paying for all of the materials which were used in the construction project. In Whyte, supra, construction work was not the worker's full time profession. In the instant case, the respondent was not paid on an hourly basis, but was paid a fixed contract price, including materials and labor which resulted from a written bid prepared by respondent. In the instant case, the respondent's full time employment is in the construction trade. (R. 90) Plaintiff's Exhibit #5 is a card given to appellant by respondent which expressly states that respondent performed contracting work of all kinds, including "steel buildings, plastering, fireplaces, brick, concrete, marble crest, remodeling". As will be discussed subsequently, respondent's activities clearly demonstrate that he was acting as an independent contractor, and not as an employee.

The fundamental significance of Whyte, supra, upon the instant case is that this Court applied the traditional test to a residential construction project and that the trial court instructions

pertaining to the test clearly indicate that the relationship in the instant case was that of an independent contractor.

The Utah cases are consistent with other jurisdictions in the surrounding area. The cases make clear that the fundamental test is whether or not the employer has the right to control the day to day means through which the ends of the project are accomplished. Further, consistent with Harry L. Young and Sons, Inc. vs. Ashton, supra, the cases are in agreement that the exercise of some limited control by an employer over work being done will not make a worker an employee, rather than an independent contractor. See Roybal vs. Bates Lumber Company, 76 N.M. 127, 412 P.2d 555 (1966); Scott vs. Murphy Corporation, 79 N.M. 697, 448 P.2d 803 (1969); Bowden vs. Robert V. Burggraf Construction Co., 375 P.2d 532 (Idaho, 1962); and Great American Insurance Company vs. General Insurance Company of America, 475 P.2d 415 (Or., 1970).

The case law discussed above leads to the inescapable conclusion that in the instant case the relationship between the parties was that of an employer-independent contractor. The evidence introduced at trial conclusively demonstrates that as a matter of law, the respondent was acting as an independent contractor.

By the agreement dated July 19, 1976, (plaintiff's Exhibit #1), the respondent contractually obligated himself to construct a

16' x 37' addition to the east side of the appellant's home. He was not at liberty to begin construction without finishing the addition, as he was not receiving hourly wages for the work that was performed. In contrast, an employee can terminate his relationship with his employer at his own discretion, and is not obligated to complete the task that he was engaged in. Singer Sewing Mach. Co. vs. Industrial Commission of Utah, et al., 104 Utah 175, 134 P.2d 479 (1943); Brubaker vs. Glenrock Lodge International Order of Odd Fellows, 526 P.2d 52 (Wyo., 1974).

The respondent was responsible for hiring his own employees and subcontractors. In addition, appellant did not pay any of the subcontractors (R. 12). Respondent admits that he hired the excavator, as well as other employees without consulting the appellant, either with respect to whom was to be hired or how much they were to be paid (R. 93, 94).

The contract price was fixed and included both material and labor charges. Appellant did not pay respondent an hourly wage (R. 12). Respondent admits that appellant never withheld any income taxes or social security taxes from any payments made to him, and that respondent never submitted any record of hours worked to the appellant (R. 114).

The respondent modified construction plans on both the

roof and plumbing (R. 13).

Respondent also admits that some general direction and guidance by a homeowner is to be expected in any construction project of this sort (R. 115).

In its decision, the trial court necessarily concluded that the respondent had contractually obligated himself to perform the plumbing work in the addition, and that as a result of defects in the plumbing work, was liable to the appellant for the reasonable cost for repair. It is difficult to understand how the respondent can be an independent contractor on the plumbing, as per the agreement dated July 19, 1976, without also being an independent contractor for the balance of the items included in the July 19, 1976 agreement.

POINT II.

THE TRIAL COURT ERRONEOUSLY REACHED ITS DECISION BY FOCUSING UPON THE AMBIGUITY OF THE RESPONDENT'S OBLIGATIONS INSTEAD OF FOCUSING UPON THE MANNER IN WHICH THE RESPONDENT PERFORMED THOSE OBLIGATIONS.

The trial court erroneously decided that the agreement was unclear as to the existence of the obligations of each party. In both the Memorandum Decision and the Findings of Fact, the trial court stated that the plaintiff (appellant herein) had failed to establish the existence of the defendant's (respondent herein) obligations resulting from the July 19, 1976 agreement between the parties, other than

with respect to the plumbing. It concluded that it was unclear if respondent was responsible for the structural work and other work which was performed in a shoddy, unworkmanlike manner.

Had the dispute arisen as to whether or not the agreement called for the respondent to perform certain obligations (as for example, was the respondent to wallpaper the drywall, or carpet the floors), the trial court's analysis would have merit. However, the dispute instead focuses upon whether the respondent performed his acknowledged responsibilities in a workmanlike proper fashion. The parties agree that the contract was binding upon them. The parties further agree that the heating and electrical work was to be excluded from the contract price. The agreement called for the respondent to build a 16' x 37' addition onto the existing dwelling. Although not specified in the agreement, the respondent was given and acknowledged receiving a drawing of the floor plan for the addition, (R. 94). It was this drawing he took to Anderson Lumber to price out materials, which along with labor charges became the basis of his quotation price.

It is inconceivable that the trial court could acknowledge that the agreement between the parties obligated the respondent with respect to the plumbing without also obligating the respondent with respect to the other items contained in the agreement. It is significant that the plumbing estimate in the agreement represented

only \$75 of the monies paid by the appellant to the respondent. Despite this, the trial court concluded that the other \$10,000.00 paid to the respondent did not obligate the respondent any further.

POINT III.

THE ADDITION BUILT BY THE RESPONDENT HAD SUBSTANTIAL STRUCTURAL DEFICIENCIES FOR WHICH THE RESPONDENT IS RESPONSIBLE.

The written agreement between the parties and the testimony at trial clearly demonstrate that the respondent obligated himself to construct a 16' x 37' addition on the side of the appellant's home. The agreement specifically obligated the respondent to supply the materials and labor for the construction of the structure. The agreement also shows that the respondent was obligated to perform the exterior masonry work for the addition. By his own admission, respondent acknowledges that he was responsible for plastering the interior walls (R. 96).

Regardless of any potential ambiguity in the contract prepared by respondent, the evidence introduced at trial makes it clear that the respondent was to erect a finished addition on the appellant's residence. The only items in the construction project for which the respondent was not responsible were the electrical and heating activities. Respondent made arrangements for digging a basement, pouring the foundation, erecting the main frame,

building a roof, plastering the walls, installing the plumbing and fixtures, and installing windows in the basement and on the main floor. Further, respondent was to place a marble finish on the exterior of the addition. (Plaintiff's Exhibit #1, R. 96)

The testimony and exhibits at trial clearly demonstrate that the addition built by respondent contains numerous structural and other deficiencies which must be corrected before the addition will meet the Provo building code.

The Record makes it clear that the addition built by the respondent is a disaster. Shelby Adams, a building inspector for Provo City, testified that an inspection of the addition was made by the Provo City Building Inspection Section, and that numerous deficiencies were found. Those deficiencies were summarized in a certified letter sent to the respondent by the Building Inspection Section on June 21, 1977 (Plaintiff's Exhibit #6). In addition to various plumbing deficiencies, numerous structural deficiencies were itemized, including:

1. No handrail combination on stairs to basement.
2. Stair risers do not conform to code. They vary from 8-1/4" to 10-5/8" and treads are also irregular.
3. Window wells are needed but missing.
4. Shower floor is breaking up.
5. Poor joists on window casings.
6. Notching of floor joist in middle of span.

7. Sub-standard head room in stairway.
8. Removed floor joist support.
9. Bathroom door strike plate missing.
10. Joints on sheetrock are miserable.
11. Bathroom door and casing do not fit properly.
12. Rear door casing is loose.
13. No base shoe molding in hall and bedrooms.
14. Floor underlayment not properly nailed in bedrooms.
15. There is a 1-1/2" difference in floor level between existing and new.
16. Window sill height 67-1/4" where 44" maximum is allowed.
17. Sub-standard ceiling height. (7'1"),
18. Irregular stair risers to furnace room (9 3/4" to 7 3/4").
19. Interior window between existing bath window and new hallway is not filled in.
20. Stair stringers are inadequate."

Mr. Adams further testified that the City has not approved, and will not approve the addition until the objections in the letter itemized above are corrected (R. 62).

Numerous photographs contained in the Record herein were introduced as plaintiff's exhibits at trial. The photographs help illustrate the extremely shoddy workmanship associated with this construction project. All of the deficiencies revealed in the photographs are respondent's responsibility. None of the deficiencies are in any way related to any electrical and heating work.

Plaintiff's Exhibit #21 shows the exterior surface of the addition with numerous cracks running throughout the surface.

Plaintiff's Exhibits #13, #14, #15, and #27 reveal the uneven and in some cases crumbling plastering of the walls.

Plaintiff's Exhibit #29 shows the lack of support at the top of the stairway running down to the basement in the addition.

Plaintiff's Exhibit #10 shows the lack of window wells in the basement windows.

Plaintiff's Exhibits #9 and #31 show the cuts in the supporting joists which resulted in a sagging in the main frame of the home.

Mr. John Conway of the Utah Business Regulations and the Department of Contractors testified that on May 13, 1977, a meeting was held with Shelby Adams, Mr. Rucker, and himself, at which the numerous deficiencies were itemized (R. 84). He further testified that the deficiencies originally itemized were found still to exist as of August 14, 1978, on which date various photographs depicting those deficiencies were taken in his presence (R. 84).

Mr. Thomas W. Smith, an experienced licensed building contractor in the State of Utah, testified that he found various structural deficiencies in the addition (R. 73, 74). He further testified that he had prepared an estimate as to the repair costs for these structural deficiencies. The estimate of \$9,490.00 pertained exclusively to the structural deficiencies which he noted with the single exception of a \$500.00 item for sewer repair (R. 76, 77).

Mr. Smith's qualifications to prepare an estimate are unchallenged. He has eight years experience as a licensed building contractor in the State of Utah (R. 73). Further, he was familiar with the work that building the addition required because he had previously prepared a bid on the project (R. 75).

The reasonableness of the repair estimate is readily demonstrable. In its judgment, the court awarded \$2,000.00 in damages for repair to the plumbing whose original construction estimate was approximately \$1,000.00. Yet, as Mr. W. D. Pons testified, commenting on the cost of repairs:

"Something like that amounts to two jobs. You have to disassemble it, and assemble it again. So, naturally, the cost might run up to double the amount . . ."
[R. 68]

Applying this analysis to the original construction estimate, the \$9,490.00 repair estimate is quite reasonable, given the scope of repairs required to be made.

POINT IV.

HAVING BEEN HEARD BY THE TRIAL COURT AS A CASE IN EQUITY, THIS COURT MAY REVIEW THE FACTS, MAKE AN INDEPENDENT ANALYSIS OF THEM, AND GRANT JUDGMENT OF ITS OWN ACCORD.

At the Pretrial Conference, the trial court characterized the proceedings as one in equity, and on this basis, a non-jury trial

was conducted. It is well established that this Court on appeal can render its own judgment.

The Utah Constitution, Article VIII, Section 9, provides:

"From all final judgments of the district courts, there shall be a right of appeal to the Supreme Court. The appeal shall be upon the record made in the court below and under such regulations as may be provided by law. In equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone. Appeals shall also lie from the final orders and decrees of the Court in the administration of decedent estates, and in cases of guardianship, as shall be provided by law. Appeals shall also lie from the final judgment of justices of the peace in civil and criminal cases to the District Courts on both questions of law and fact, with such limitations and restrictions as shall be provided by law; and the decision of the District Courts on such appeals shall be final, except in cases involving the validity or constitutionality of a statute." [Emphasis added]

This Court has exercised its authority to issue its own judgment rather than remand for retrial in equitable actions. In Creer vs. Thurman, 581 P.2d 149 (Utah, 1978), this Court reversed an order of the trial court awarding specific performance or damages to the purchasers in a suit on an oral agreement to convey land. On appeal, this Court reviewed the trial record and held that the agreement to convey had been conditional, and which condition had not occurred. Accordingly, this Court reversed the order of the

trial court and entered judgment for the defendant seller.

This Court may enter judgment for appellant by determining that the judgment of the trial court was against the weight of the evidence, even if this Court should conclude that the evidence did not mandate judgment for the appellant in the trial court as a matter of law. Ream vs. Fitzen, 581 P.2d 145 (Utah, 1978); Bear River State Bank vs. Merrill, 101 Utah 176, 120 P.2d 325 (1941).

Surrounding jurisdictions have adopted a similar position regarding the right of the appellate court to make an independent analysis of the facts in an equitable proceeding. In Starr vs. International Realty, Ltd., 271 Or. 396, 533 P.2d 165 (1975), an equitable suit was brought by the partners in a real estate venture to require the realtor and promoter of the venture to render an accounting to the partnership for commissions from purchased real estate. In modifying the trial court judgment, the Oregon Supreme Court stated:

"[A]lthough we accord great weight to the decision of the trial court on this question, as we ordinarily do on all such questions in suits in equity, it must be kept in mind that this is an appeal in a suit in equity, which we try de novo."
[Id., at 170]

CONCLUSION

The agreement between the parties created an employer-

independent contractor relationship as a matter of law. A review of the evidence clearly indicates that all of the factors pointing towards an independent contractor determination are applicable to the respondent in the instant case. As such, the respondent is responsible for all of the deficient construction pursuant to the contract between the parties.

The evidence clearly indicates that the agreement entered into between the parties placed substantial obligations upon the respondent. The evidence further indicates that the respondent performed these obligations in a shoddy unworkmanlike manner resulting in serious structural deficiencies to the addition.

Employees of both the Provo Building Inspection Section and the Utah Department of Contractors testified as to the existence of these deficiencies, and indicated that these deficiencies must be corrected before the Provo City Building Inspection Section will approve the addition. Costs of repair of these deficiencies was determined by a licensed building contractor for the State of Utah with eight years experience. The reasonableness of this repair estimate was unchallenged.

Even if this Court should be unable to conclude that as a matter of law respondent is responsible for these structural deficiencies, this Court may reverse the decision of the trial court

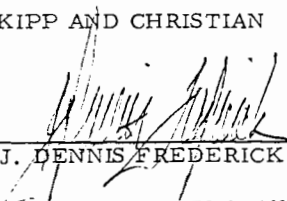
and institute judgment for appellant. Article VIII, Section 9 of the Utah Constitution authorizes this Court to make an independent analysis of both the law and the facts in equitable proceedings. Having been determined to be an equitable proceeding at the trial court, this Court may institute judgment for appellant either as a matter of law or as a result of making its own appraisal of the facts in this equitable proceeding.

Appellant requests this Court to institute an increase in the judgment in favor of appellant of \$9,490.00 for a total of \$11,490.00 against respondent as a result of the deficient workmanship in the addition for which respondent is responsible.

Dated this 5th day of December, 1978.

Respectfully submitted,

KIPP AND CHRISTIAN

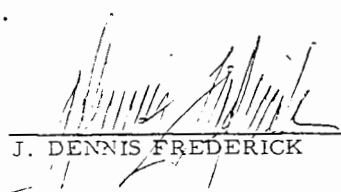


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MAILING CERTIFICATE

I hereby certify that I mailed three copies of BRIEF OF APPELLANT to Ronald R. Stanger, attorney for Defendant and Respondent, 38 North University Avenue, Provo, Utah 84601, this 5th day of December, 1978.



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