

1979

# Glade Faatz v. Warren L. Forsythe and Ameriwest : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

\* \* \* \* \*

GLADE FAATZ,	)	
	:	
Plaintiff and	)	
Respondent,	:	
	)	
-vs-	:	NO. 16379
	)	
WARREN L. FORSYTHE and	:	
AMERIWEST,	)	
	:	
Defendant and	)	
Appellant.	:	

\* \* \* \* \*

BRIEF OF RESPONDENT

\* \* \* \* \*

Appeal from the Judgment of the  
Sixth Judicial District Court of Sevier County  
Honorable Don V. Tibbs, District Judge, Presiding

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Appellant, Warren L. Forsythe  
and Ameriwest

FILED

SEP 27 1979

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# TABLE OF CONTENTS

## BRIEF OF RESPONDENT

	<u>Page</u>
STATEMENT OF KIND OF CASE . . . . .	1
DISPOSITION IN THE LOWER COURT . . . . .	1
RELIEF SOUGHT ON APPEAL . . . . .	1
STATEMENT OF FACTS . . . . .	2
ARGUMENT . . . . .	5
THE COURT CORRECTLY ENFORCED THE AGREEMENT OF THE PARTIES . . . . .	5
CONCLUSION . . . . .	8

## AUTHORITIES CITED

### CASES

<i>Angerman Company, Inc. vs. Edgemon</i> , 76 U 394, 290 P 169 (1930) . . . . .	5
<i>Charlton vs. Hackett</i> , 11 U2d 389, 360 P2d 176 (1961). . . .	5
<i>Jespersion vs. Deseret News Pub. Co.</i> , 225 P2d 1050, 119 U 235 (1950) . . . . .	5
<i>Leon Glazier &amp; Sons, Inc. vs. Larson</i> , 491 P2d 226, 26 U2d 429 (1971) . . . . .	5
<i>Santi vs. Denver &amp; R. G. W. R. CO.</i> , 442 P2d 921, 21 U2d 157 (1968) . . . . .	5

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GLADE FAATZ,	)	
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Plaintiff and	)	
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-vs-	:	No. 16379
	)	
WARREN L. FORSYTHE and	:	
AMERIWEST,	)	
	:	
Defendant and	)	
Appellant.	:	

\* \* \* \* \*

STATEMENT OF KIND OF CASE

Plaintiff brought suit against Defendants for costs of installing a fireplace and for the cost of installing a gravel driveway included in a construction agreement executed by the parties and in accordance with the agreed amendments.

DISPOSITION IN THE LOWER COURT

The trial court, the Honorable Don V. Tibbs, Sixth District Judge, presiding without a jury, granted judgment for the Plaintiff-Respondent on his Complaint in the total sum of \$1639.66. Defendant appeals from only \$755.25 of the total judgment.

RELIEF SOUGHT ON APPEAL

The Plaintiff and Respondent asks this Court to affirm the judgment of the lower court.

## STATEMENT OF FACTS

The Record on Appeal is divided into two parts. The pleadings and the findings and judgment will be referred to as the Record ("R."), the testimony as the transcript ("Tr."), and the Exhibits as ("Exh.").

The Respondent will use the same designation Appellant has used to identify the parties.

The Plaintiff did, on the 9th day of June, 1977, enter into a contract with the Defendant for the purchase of a certain Precision-Bilt Home, Plan No. 577-77, which was to be delivered and set upon the property owned by Plaintiff, together with the on-site construction improvements specifically shown in the contract (Exh.2) and the home plans (Exh. 3). The plans provided for a fireplace in the home.

The Plaintiff has paid to the Defendants the full consideration of \$43,500.00 (R.13).

The plans and specifications (Exhs. 2 and 3) required the Defendants to install a gravel driveway and a fireplace and to complete the construction thereof in a reasonable manner.

Prior to June 17, 1977, the Plaintiff was advised by Defendant Forsythe that if the fireplace was left in the plan it would delay the delivery of their home and it would be faster if the Intermountain Precision-Bilt Homes did not build the fireplace (Tr. 27, Lines 21 through 30). The Plaintiff, his wife and Mr. Forsythe and a representative of the company agreed to delete the chimney and that the Defendant would construct the chimney on the site (Tr. 29, Lines 6-11).

Defendant instructed the Plaintiff to go to the manufacturing plant in Ogden and pick up some of the needed components for the construction of the fireplace (Tr. 37, Lines 4-28). The Defendant, in his regular course of business, prepared or had prepared Exhibit 7 and forwarded it to Precision-Bilt Homes. The Exhibit provides "delete fireplace header only. Note: Facing and fireplace by dealer." (See Exh. 7 which confirmed to the manufacturer that the dealer had additional responsibility concerning the fireplace.)

The parties, including both Plaintiff and Defendant, entered into an application to the Veterans Administration to escrow certain monies with this request; "We would like the cement slab walk and fireplace put in an escrow fund until better weather permits their construction" (Exh. 12).

Mrs. Faatz testified that she had been present when discussions with Defendant Forsythe took place concerning the fireplace. She said:

Well, he said that we should get the bricklayer and he would pay for it out of the \$43,500.00 that was in our contract and that the fireplace was included and it would be paid out of this money. (Tr. 74, Lines 22-26)

The Defendant said he did not intend to do any of the work himself but intended to place the obligation of finding sub-contractors upon Plaintiff. (Defendant's testimony: Tr. 101, Lines 4-12) However, Defendant agreed to pay the owner or

approved sub-contractor from the total purchase price of \$43,500.00 (Tr. 97, Lines 7-21).

The Defendant acknowledged the change order on the fireplace and that he had an obligation as shown on Exhibit 7 with regard to the fireplace (Tr. 99, Lines 11-19). However, he stated he did not plan to do any work and left the work of getting sub-contractors up to Faatz (Tr. 99, Line 22).

Based upon the testimony of the parties and an examination of the Exhibits, the District Court entered the following specific Findings of Fact (R. 13, 14):

1. That on or about the 9th day of June, 1977, the Plaintiff entered into a contract with the Defendant for the purchase of a certain Precision-Bilt Home, Plan #577-77, which was to be delivered and set upon the property owned by the Defendant, together with the on-site construction improvements specifically required therein.

2. That the Plaintiff has paid to the Defendant the full consideration of \$43,500.00.

3. That according to the plans and specifications and construction contract herein identified, the Defendant was to install a gravel driveway, a fireplace and complete the construction thereof in a reasonable manner.

4. That the Defendant has failed and refused to install the driveway, which has a reasonable construction cost of \$790.00 and has further failed and refused to install a fireplace in accordance with the agreement of the parties. The fireplace was

installed at a total cost of \$1755.25. The Defendant is entitled to a credit of \$1,000.00 thereon, leaving an unpaid balance for said fireplace in the sum of \$755.25.

### ARGUMENT

#### THE COURT CORRECTLY ENFORCED THE AGREEMENT OF THE PARTIES

The Utah Supreme Court has, on many occasions, announced the rule that in actions at law the Findings of a trial court are not to be disturbed unless clearly against the weight of evidence. In *Charlton vs. Hackett*, 11 U2d 389, 360 P2d 176 (1961) Justice Crockett wrote:

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

This statement of law is further supported by many Utah cases including: *Angerman Company, Inc., vs. Edgemon*, 76 U 394, 290 P 169 (1930); *Jespersion vs. Deseret News Pub. Co.*, 225 P2d 1050, 119 U 235 (1950); *Santi vs. Denver and R. G. W. R. Co.*, 442 P2d 921, 21 U2d 157; *Leon Glazier & Sons, Inc., vs. Larson*, 491 P2d 226, 26 U2d 429.

In accord with the announced decisions, the evidence should be reviewed in the light most favorable to the Plaintiff who was the prevailing party.

The parties entered into a contract on the 9th day of June, 1977, which provided for a specific home to be delivered and erected upon Plaintiff's land (Exh. 2). The plans which were a part of the contract of the parties (Exh. 3) provided for a fireplace and certain other work to be done by the contractor. The total cost to the Plaintiff for the home and improvements was \$43,500.00.

Plaintiff learned from Defendant during the month of July, 1977, the home would not be available for some time unless different arrangements were made on the fireplace (Tr. 27 and 28). The Plaintiff, his wife, the Defendant and an agent from Inter-mountain Precision-Bilt Homes, were present when the matter was discussed (Tr. 28). An agreement was reached whereby the chimney would be deleted and that the contractor (Defendant) would construct the chimney on the site (Tr. 29; Tr. 72, Line 27; Tr. 35, Line 12-18).

The Defendant caused to be prepared, in his usual course of business, a change order (Exh. 7) which ordered I.P.B.H. to delete the fireplace but which showed on its face that there was an agreement between the dealer (Defendant) and the Plaintiff wherein Defendant had an obligation for the fireplace. The material part of Exhibit 7 reads: "Delete fireplace-header only (Note: Facing and fireplace by dealer)".

After the home was placed upon the property of the Plaintiff, the parties had a discussion concerning a bricklayer to build the chimney and complete the fireplace (Tr. 36, Lines 5-15). Defendant advised the Plaintiff to find the sub-contractor

and Defendant would pay the expense. (Tr. 38, line 29; Tr. 97, Line 21; Tr. 74, Line 20). The contract between the parties (Exh. 2) contemplated the practice and makes allowance for payment by Defendant to sub-contractor secured by Plaintiff. The contract provides: "Allowance will be made to owner for work done by his approved sub-contractor." (See Exh. 2).

The Defendant testified that he was responsible for the entire contract in the total amount of \$43,500.00. However, he stated that he did not plan to do anything in the way of obtaining sub-contractors or others to do the work. He relied upon Plaintiff to do this (Tr. 97, Line 7-21; Tr. 99, Line 22). The Defendant insisted Plaintiff obtain a sub-contractor to dig the basement and insisted Plaintiff obtain a sub-contractor to lay the brick for the fireplace.

In further acknowledging an obligation for the fireplace, it is noted when the work was delayed because of weather, Defendant entered into a petition to the Veterans Administration dated March 22, 1978 which requested: "We would like the cement slab, walk, and fireplace put in an escrow fund until better weather permits their construction." (See Exh. 15)

The question of the extent of the contract between the parties and the modification thereof, was reviewed in considerable detail by lower court. The finding was made that the contract was modified and the dealer (Defendant) retained the obligation to complete the fireplace part of the construction project. The evidence amply supports the Plaintiff's testimony and the testimony

of his wife. It is further corroborated by the written change order to I.P.B.H. leaving fireplace header in home and reserving fireplace parts as dealer's obligation and a Veterans Administration application for extension of time to complete fireplace.

The evidence shows that the Defendant secured a considerable work advantage by requiring the Plaintiff to secure all sub-contractors who were used on the project. Defendant stated he did not plan to do anything on the project but left it to Faatz (Tr. 99, Line 22). He merely reserved the right to approve the work done either by Plaintiff or by an approved sub-contractor (Warren Forsythe's testimony, Tr. 97, Line 7-21).

#### CONCLUSIONS

We respectfully submit the lower court correctly found as to the contract existing between the parties and the Defendant's obligation for the fireplace cost of \$755.25. The finding of the lower court with regard to the fireplace should be affirmed.

Respectfully submitted,

OLSEN AND CHAMBERLAIN

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ACKNOWLEDGMENT OF SERVICE

We acknowledge that two (2) copies of the foregoing Brief of Respondent were served upon us by Olsen and Chamberlain, delivered to our office at 151 North Main Street, Richfield, Utah, (84701) this 25 day of September, 1979.

JACKSON, McIFF & MOWER  
By K. L. McIff

By /s/ Sheila White