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Fortune Construction, Inc. v. Larry K. Alexander : Brief of Appellant

Utah Court of Appeals

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V

IN THE UTAH COURT OF APPEALS

FORTUNE CONSTRUCTION, INC., a Utah corporation, Plaintiff, Appellant and Cross-Appellee, vs. LARRY K. ALEXANDER, an individual, Defendant, Appellee and Cross-Appellant.	Case No. 98-1596 CA Civil No. 95-03-00151 LM Priority No. 15

BRIEF OF APPELLANT

ON APPEAL FROM AN ORDER OF THE THIRD JUDICIAL DISTRICT COURT, SUMMIT COUNTY, STATE OF UTAH THE HONORABLE PAT BRIAN

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LIST OF PARTIES

The caption contains a list of the parties.

TABLE OF CONTENTS

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

JURISDICTIONAL STATEMENT 1

ISSUES PRESENTED FOR REVIEW AND STANDARDS OF REVIEW 1

DETERMINATIVE STATUTES, ORDINANCES, AND RULES 2

STATEMENT OF THE CASE 3
- Nature of the Case 3
- Disposition Below 5
- Statement of Facts 5

SUMMARY OF ARGUMENT 13

ARGUMENT 14
- POINT I: There is insufficient evidence to support the trial court's finding that the reasonable value of the improvements to Defendant's property is not less than $81,800. 14
- POINT II: The trial court erred when it concluded that the "reasonable amount of completing the work identified to the contract is $18,210." 19
- POINT III: The trial court's determination of the amount of damages to which Fortune is entitled fails to appropriately apply Utah law and must be corrected. 21
- POINT IV: The trial court's failure to award attorney's fees to Fortune constitutes error. 23

CONCLUSION 27

TABLE OF AUTHORITIES

Anesthesiologists Associates of Ogden v. St Benedict's Hospital, 884 P.2d 1236, 1238 (Utah 1994) 2
Bailey-Allen Co., Inc. v. Kurzet, 945 P.2d 180 (Utah Ct. App. 1997). . . . 15
Bailey v. Call, 767 P.2d 138 (Utah Ct. App. 1989) 26
Holman v. Sorenson, 556 P.2d 499 (Utah 1976) . . 1, 12, 16, 21, 22, 26
Interiors Contracting Inc. v. Navalco, 648 P.2d 1382 (Utah 1982) 24
J.V. Hatch Construction, Inc. v. Kampros, 971 P.2d 8 (Utah Ct. App.1998) 25, 27
John Call Engineering, Inc. v. Manti City Corp., 795 P.2d 678 (Utah Ct. App.1990) 22
Keller v. Deseret Mortuary Company, 455 P.2d 197 (Utah 1969) 22
K.J. Scharf v. BMG Corporation, 700 P.2d 1068, 1070 (Utah 1985) . 2, 20
Reeves v. Steinfeldt, 915 P.2d 1073 (Utah Ct. App.) 26
Richards v. Security Pacific 27
Stangl v. Marathon Steel Company, 554 P.2d 1316 (Utah 1976) 19
Woodward v.Fazzio, 823 P.2d 474, 477-78 (Utah Ct. App. 1991) 1, 15, 18

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Article VIII, Section 5, of the Utah Constitution; *Utah Code Annotated* §78-2a-3(2)(j).

ISSUES PRESENTED FOR REVIEW AND STANDARDS OF REVIEW

1) Is there sufficient evidence in the record to support the trial court's finding of fact as to the reasonable value of the improvements to Defendant's property, which the court found to be not less than $81,800.00?

The standard of review for this issue is the "clearly erroneous" standard as set forth in Rule 52(a), *Utah R. Civ. P.*, which states that findings of facts "shall not be set aside unless clearly erroneous." See also, Holman v. Sorenson, 556 P.2d 499, 500 (Utah 1976) (the Court will not disturb finding "if there is a reasonable basis in evidence to support it."). However, the high degree of deference otherwise accorded to a trier of fact's findings will not be accorded in cases in which the findings are insufficiently detailed to indicate the factual basis for the findings. Woodward v.Fazzio, 823 P.2d 474, 477-78 (Utah Ct. App. 1991).

2) Did the trial court err in concluding that the reasonable cost of completing the work identified to the contract is $18,210?

In reviewing the trial court's conclusions of law, the appellate court

reviews for correctness and accords no deference. K.J. Scharf v. BMG Corporation, 700 P.2d 1068, 1070 (Utah 1985).

3) Did the trial court fail to apply Utah law in concluding that the amount of damages to which Fortune is entitled is $33,590.00, as set forth in the court's fifth conclusion of law?

The appropriate standard of review of this issue is a review for correctness. Anesthesiologists Associates of Ogden v. St Benedict's Hospital, 884 P.2d 1236, 1238 (Utah 1994) (on legal questions, "we accord the conclusions of the court below no particular deference but review them for correctness.").

4) Having concluded that Fortune was entitled to foreclose its mechanic's lien, did the trial court err when it then failed to award Fortune its legal fees and costs, which are mandated pursuant to statute?

This issue involves a question of law which the appellate court reviews for correctness, without deference. K.J.Scharf v. BMG Corporation, 700 P.2d 1068, 1070 (Utah 1985).

DETERMINATIVE STATUTES, ORDINANCES, AND RULES

Two sections of the Utah Code are determinative with respect to the issue of attorney's fees. They are Section 38-1-7, which provides:

(1) A person claiming benefits under this chapter shall file for

> record with the county recorder of the county in which the property, or some part of the property, is situated, a written notice to hold and claim a lien...
> ...
> (4)(c) Failure to deliver or mail the notice of lien to the reputed owner or record owner precludes the lien claimant from an award of costs and attorneys' fees against the reputed owner or record owner in an action to enforce the lien.

and Section 38-1-18:

> Except as provided in Section 38-11-107, in any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action.

STATEMENT OF THE CASE

Nature of the Case

This case involves a contract to construct a dried-in shell for a residence located in rural Summit County, Utah, above 8,000 feet, which at the time of construction was accessible only by dirt road and only during the late Spring, Summer and early Autumn. A dispute arose when the owner of the property, Mr. Larry Alexander ("Alexander"), who was Defendant below and is Appellee and Cross-Appellant in this Court, failed to pay the second installment on the contract price. By that time, he had requested numerous changes to the construction and significant costs had been incurred. Additionally, Alexander ran into and dislodged one of the pillars supporting the second floor, at a time when concrete had been poured on the second level, but had not yet set,

causing shifting and damage to the structure and the concrete work.

By the end of September, 1995, even though Plaintiff Fortune Construction, Inc. ("Fortune") had been on the job since mid-July, had only been paid $30,000, had expended more than twice that amount, Fortune stayed on the job to complete those items that were most critical to protect the structure from weather, as the approach of winter was imminent and the site was about to become inaccessible.

The following summer, in August 1996, Alexander obtained a report from Mr. Joseph Crilli, a professional engineer, as to which items needed to be finalized to complete the contract. Alexander, however, took no steps to complete any of those items for more than another year. Not surprisingly, there was damage to the building due to harsh weather conditions and Alexander's failure to protect the building by doing such things as installing a moisture barrier. At the first day of trial in August 1997, the trial court ordered Alexander to complete most of the items on Mr. Crilli's list in order to protect the structure, yet even then Alexander did not take care of those items.

Fortune filed a lien against the Alexander property and then initiated this action to foreclose the lien, and to recover damages for breach of contract, or payment based on quantum meruit or unjust enrichment. Alexander answered and counterclaimed against Fortune for breach of contract and breach of

warranty and asserted affirmative defenses including duress.

Disposition Below

After 3 days of trial, held on August 12, December 10 and December 23, 1997, the trial court signed Findings of Fact, Conclusions of Law and Judgment on August 21, 1998 (R. 238 - 240). A copy of the Findings, Conclusions and Judgment is attached to the Appendix hereto as Exhibit "A". The court ruled that Fortune should be allowed to foreclose its lien and awarded Fortune $33,590. in damages, but did not award attorney fees and costs. Counsel for the parties did not receive copies of the Judgment until Thursday, September 17, 1998. Although Fortune's counsel would have preferred to resolve certain unclear or inadequately detailed items contained in the Judgment by post-judgment motion, counsel was unable to get an extension to file a notice of appeal on September 18, so that Fortune had no choice but to file this appeal on Friday, September 18, 1998. Alexander thereafter filed a cross-appeal.

Statement of Facts

Plaintiff Fortune Construction, Inc., a licensed general contractor in Utah, and Defendant Larry Alexander, the owner of an isolated, high-altitude building lot in Summit County, Utah, entered into a written contract in 1995 for the construction of a dried-in shell for a residence on Alexander's lot. (R. 240 Finding 1). The contract dated September 22, 1995 and signed September 25,

1995 by Fortune and Alexander (the "Contract") was introduced and admitted at trial as Exhibit N (R. 379 at 38); a copy of the Contract is attached to the Appendix hereto as Exhibit "B"). The contract was executed several weeks after Fortune began construction on Alexander's lot in mid-July. (R. 379 at 78). The contract price was $97,600.00, due in four installments of which Alexander paid only the first installment of $30,000.00. (R. 240 Finding of Fact 2.) However, after Alexander refused to make the payment, Fortune continued to work at the job site for four to five days to protect the structure from the effects of winter at over 8,000 feet. (R. 239-240 Finding 5).

After Fortune pulled off the job-site, Alexander failed to complete the work identified to the contract, despite a letter to Alexander from Joseph Crilli, the professional engineer who engineered the project, indicating a need to complete certain items. (R. 239 Finding 6). For over eighteen (18) months Alexander failed to take action to protect the structure from degradation caused by leaving the structure unprotected from weather and moisture. (R. 239 Finding 7). On August 12, 1997, using the Crilli letter as a guide, the Court ordered Alexander to complete the contract work to protect the structure from another winter's exposure. However, Alexander failed to do the work ordered by the Court. (R. 239 Findings 8 and 9). In addition to failing to complete the contract work, Alexander could have installed a moisture barrier and insulation

before the winter of 1995, but did not do so. (R. 239 Finding 10).

Fortune filed timely notice of a lien against Alexander's property in the amount of $67,600 and provided Alexander with timely notice of the lien filing. Plaintiff's Complaint at ¶¶ 16, 18 (R. 016-17); Defendant's Answer at ¶¶ 16, 18 (R. 031), and the trial court so found. (R. 239 Finding 11). The notice of lien failed to subtract the amount necessary to complete the work identified to the contract from the contract price, but was otherwise accurate. (R. 239 Finding 12). Fortune's expert, Brent Thomas, a licensed structural engineer, testified that the cost to complete the Contract was between $4,000 and $5,000. (R. 379 at 162).

Fortune filed a timely action to foreclose its lien and the trial court ruled that Fortune would be allowed to foreclose its lien against Alexander. (R. 238 Conclusion 3). Although Alexander filed a counterclaim against Fortune for breach of contract, breach of warranty and negligence and asserted affirmative defenses, the trial court did not rule in Alexander's favor on those claims and defenses. (R. 238-40).

At trial, there was considerable testimony by Alexander and a contractor ultimately hired by Alexander in 1997, Ronald Elwood Hansen, as to work that was done to the structure in late 1997. Mr. Hansen testified that he could not have done the repairs that he did for less than $5,000 (R. 249 at 88). Instead,

Mr. Hansen testified to labor costs of $1,600 (R.249 at 80) and material costs of $16,164.23 (R.249 at 87). Alexander's Exhibit 1, apparently prepared by Mr. Hansen, indicates that the total cost of repairs to the house is $46,785.05. (Defendant's Proposed Findings of Fact and Conclusions of Law, R.228 ¶ 10) According to Alexander's Proposed Findings of Fact and Conclusions of Law, Mr. Hansen estimated that additional work that is required to complete the house will include: $34,000 to rebuild the dormers, $904 to double the TJI's under the balconies, $1,700 to temper and reinstall windows, $11,481 to repair and reinstall the boiler, $7,050 to remove and replace the concrete floor in order to repair the heating system and an additional $55,135 "to complete repair work and bring the home to a structurally sound dried-in shell that complies with building code requirements." (R. 228 ¶ 11). Having reviewed the work that was done by Alexander and his contractor, however, Fortune's expert, Brent Thomas, a licensed Professional Engineer and Utah Certified Structural Engineer, stated in a sworn affidavit that in his "professional opinion the procedures followed by Mr. Alexander, apparently at the direction of Mr. Carlson [Alexander's engineer], were economically wasteful, unnecessary and counterproductive." (Affidavit of Brent F. Thomas, R.174-75)(emphasis added).[1]

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[1] Rather than extending the trial by taking testimony from an engineer hired by Alexander, who failed to appear on either

By way of examples, Alexander wants to repair the dormers and make them functional, rather than ornamental, by removing most of the roof in order to reinstall the dormers. (R. 249 at 51-52). However, according to Brent Thomas,

> Mr. Alexander's contractor's testimony as to the need to remove the existing roof trusses makes no sense from an economic or engineering standpoint. In my professional opinion, should Mr. Alexander wish to depart from the original plans to make the dormers accessible from the interior of the residence, then the header beams could be engineered to carry the anticipated loads and the existing roof structure trusses cut out as required. The contractor's proposed change is not required to build the residence to the original plans and is in my professional opinion far more expensive than necessary to accomplish the desired change.

(Thomas Affidavit, R.150-51).

Additionally, cross-bracing of the carport had been called for in the plans, but was one of the items that Fortune was not able to complete prior to leaving the job-site (R. 379 at 63; Letter of Joseph E. Crilli, Plaintiff's Exhibit S). Instead of simply installing the braces according to the plans and pursuant to the directions of Mr. Crilli, Alexander closed in the carport with plywood sheathing. Brent Thomas stated that this was unnecessary and actually

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> of the days during which testimony was taken, and rebuttal by Fortune's engineer, Brent Thomas, and Pat Fortune, the parties stipulated that the evidence would be presented by affidavits. (R. 249 at 91-92: Order, R. 136-38).

detrimental to the structure.

> The installation of the plywood sheathing on the interior and exterior faces of the carport's walls was unnecessary and not in accordance with the plans. Previous testimony from Mr. Alexander's contractor stated that this sheathing was installed to serve as a vertical diaphragm or shear wall. These walls do not meet code requirements for vertical shear walls and if they did, the anticipated shear due to horizontal loading does not necessitate sheathing on both faces. The installation of diagonal bracing between the timber columns would have provided better lateral stability and been a more economical solution than the framing and sheathing actually installed.

(Affidavit, R.143).

Alexander also points out that there are windows in the structure that require tempered glass. The need for tempered glass, however, only arose because Alexander made design changes which required tempered glass after the windows were ordered and installed (R. 344 at 64-65; Affidavit of Pat Fortune, R. 156-57).

As a final example, although there are many others, Alexander testified that the boiler is not working, and the heating system, consisting of pipes in the concrete floor of the second level, is leaking, so that it will cost $11,480 to repair and reinstall the boiler. (R. 344 at 55-56). Additionally, Alexander contends that it will cost $7,050 to remove and replace the concrete floor in order to repair the heating system. (R. 228 ¶ 11). Alexander testified that the boiler "was frozen and cracked beyond repair." R. 344 at 55). In his rebuttal

affidavit, Pat Fortune stated that before he left the job in the fall of 1995, the in-floor heating system was installed and pressure tested and the pipes and the boiler were filled with pure glycol; additionally, the system was pressurized during the concrete pour in the residence. It was Pat Fortune's opinion that the leaks in the system were not caused by freeze damage. (Fortune Affidavit, R. 157). However, just after the concrete was poured, Alexander ran into one of the 12 inch diameter wood columns that supported the second level floor with a backhoe and knocked the column out, while the concrete was still setting. The result was that the concrete on that level did not set evenly. (R. 157). Mr. Fortune's testimony as to the events of that day explains the situation:

> Q During the time you were working on the project, did the owner do any damage to the structure?
> A Well, he ran into the building a couple times with a backhoe. The day that we poured the concrete on the upper floor, half of which is supported by four poles under the right side of the building there. You can see the drive through area. The concrete was poured on the upper floor, which is a concrete inch and a half thick which encases the heat tubes. It's hydronic heat throughout the building. I got home, and it must have been I wasn't home 15 or 20 minutes, and I got a call he had hit one of the posts with the backhoe and knocked it out and the main floor beam -- it has a center beam coming through running this way in the building, that was knocked out.
> Q Along this axis?
> A Right. The floor had sagged about a foot and a half with the wet concrete in it. So I jumped in my truck went back up there. I had to take a 20-ton jack and jack that floor back into position. Of course, the concrete was almost set at the time so I'm surprised it didn't break any of the heat tubes, which I don't think it did. It

might have, but I don't think it did.

(R. 344 at 84-85).

In final argument Fortune called to the Court's attention the Utah rule for the calculation of damages for an incomplete fixed price construction contract as set forth in Holman v. Sorenson. (R. 344 at page 12), and asserted Fortune's claim for attorney's fees and costs under the mechanic's lien statutes. (R. 344 at page 13).

Following the conclusion of final arguments, on December 31, 1997, Judge Brian's Summit County rotation ended and he returned to full time service on the bench in Salt Lake City. Because of irregularities in the way the court's file was managed, counsel for Fortune and Alexander received notice of the Court's Findings, Conclusions and Judgment on Thursday, September 17, 1998, which was almost a month after signing and only one day before the deadline for filing a notice of appeal. Fortune's motion for an extension of time to file the notice of appeal was denied on the following day, and Fortune was forced to file its notice of appeal. Because of the lack of notice, both parties were denied the possibility of arguing post-judgment motions to modify or clarify certain ambiguous items contained in the Judgment.

SUMMARY OF ARGUMENT

I. The trial court found that there was a written contract between the parties and that the contract price was $97,600 (R. 238 Finding 2). The court then found that the reasonable value of the improvements to Alexander's property was not less than $81,800 (R. 239, Finding 13), but gave no indication of how the court arrived at that number or on what evidence the court relied to compute that amount. Furthermore, there is no clear evidence that established the $81,800 amount, so that Finding of Fact 13 is not supported by sufficient evidence.

II. Although the trial court has concluded that the reasonable cost of completing the Contract work is $18,210, the court has provided no legal basis for such a conclusion. Nor does there appear to be a basis in the evidence, as there are differing numbers that were presented by both sides, none of which is equal to the $18,210 figure. Without an evidentiary basis, and because the amounts are disputed, the $18,210. number cannot be established, and the court's conclusion is without support.

III. Utah case law on the determination of damages in an unfinished construction contract dictates that the correct measure of damages is the contract price less the amount saved by the non-breaching party, which is the amount that would have been expended in completing the contract. Because

the trial court failed to apply that measure of damages in this case, the award of damages to Plaintiff is not correct and should be changed to the contract price, less the amount paid and less the reasonable cost of contract completion.

IV. The Utah Mechanic's Lien statute provides that if a party is successful in bringing an action to foreclose a lien, and does not fail to mail a notice of the lien to the property owner, such party shall be entitled to recover a reasonable attorneys' fee. In this case, Fortune properly filed the lien, mailed the notice to Alexander and the trial court ruled that Fortune was entitled to foreclose its lien. On that basis, the court should have awarded attorney fees and costs to Fortune.

ARGUMENT

POINT I: There is insufficient evidence to support the trial court's finding that the reasonable value of the improvements to Defendant's property is not less than $81,800.

In its thirteenth Finding of Fact, the trial court found that, "[T]he reasonable value of the improvements to Defendant's property is not less than $81,800 which Defendant has only paid $30,000." The latter part of the finding, referring to the amount paid by Alexander, is accurate and supported by the evidence. However, to the extent that the trial court found that the value of the improvements is $81,800, this finding is not supported by the

evidence.

Findings of fact are not set aside unless they are determined to be "clearly erroneous." Rule 52(a), Ut. R. Civ. P. In order to challenge a finding of a trier of fact, it is well established that the party challenging the finding must marshal all of the evidence supporting the finding and then show that the evidence is not sufficient to support the finding, even when the evidence is viewed in the light most favorable to the court's finding. *See, e.g.*, Bailey-Allen Co., Inc. v. Kurzet, 945 P.2d 180, 186 (Utah Ct. App. 1997). In some cases, however, a finding may be sufficiently inadequate that marshaling the evidence is futile. Woodward v. Fazzio, 823 P.2d 474, 477-78 (Utah Ct. App. 1991). Fortune believes that the trial court's thirteenth finding of fact falls into that category. Nonetheless, even if the relevant evidence is reviewed, it provides no basis for the finding in question.

A consideration of the evidence presented by Alexander at trial gives no indication that the "reasonable value of the improvements to Alexander's property is not less than $81,800...." The original contract price was $97,600. The Contract dated September 22, 1995 and signed September 25, 1995 by Fortune and Alexander (the "Contract") was introduced and admitted at trial as Exhibit N (R. 379 at 38); a copy of the Contract is attached to the Appendix hereto as Exhibit "A". It is reasonable that in order to determine the value of

the improvements Fortune made to the Alexander property, the trial court might have considered the contract price, less the reasonable cost to complete the contract items. See, Holman v. Sorenson, 556 P.2d 499, 500-01 (Utah 1976). The $81,800 does not, however, appear to reflect any of the numbers that might have been applied by the court in that determination.

Pat Fortune, one of the principals of the Fortune and the general contractor performing the work under the Contract testified that at the time that Fortune left the job based on Alexander's failure to pay, there were certain contract items that had not been completed. Mr. Fortune testified that the cost to complete those items would have been $3,400 to $3,500. (R. 379 at 96). Fortune's structural engineer testified that the cost to complete the items identified to the Contract would be just under $5,000. (R. 379 at 162). Not surprisingly, the contractor hired by Alexander in 1997, Ronald Elwood Hansen, testified to work that he performed on the house, and stated that he could not have done the repairs that he did for less than $5,000 (R. 249 at 88). Mr. Hansen, testified to work that he performed on the house, most of which was related to repairing damage caused by Alexander's neglect and to design changes ordered by Alexander, (R.239, Findings 6,7,8,9,10; R. 379 at 37, 51-52, 62-66), as set forth at pages 7 through 11 above. Thus, Mr. Hansen testified to numerous repairs and changes with varying costs for labor and

materials, no combination of which can be made to fit the Court's finding that the reasonable value of the Fortune's improvements to the property was $81,800, or the court's conclusion that the reasonable cost of completing the work identified to the contract is $18,210. Although it is Fortune's position that Mr. Hansen's numbers reflect enormous waste and an attempt by Alexander to build a structure that has no relationship to the work that was to be completed by Fortune, none of the numbers supports the $81,800 amount.

A number that is closer to the trial court's Finding 13 was given in the testimony of Heidi Fortune, the Vice President of Fortune who, because of her 20 year background in finance, is responsible for all bookkeeping, invoicing and payment. (R. 379 at 16). Heidi Fortune testified that in total, Fortune paid out $86,231.71 on the Alexander project prior to the time that Fortune left the job in 1995, of which $10,987.48 was for labor, with the remainder [$75,244.23] being for materials. (R. 379 at 37-38). It is very possible that the court took the figure of $86,000 and subtracted $4,200, a number that is within the range that Fortune's expert testified would be the cost to complete the contract (R.379 at 162), to arrive at the finding that the value of the improvements was $81,800.

The problem with the trial court's thirteenth finding of fact is that even if there is some combination of these numbers that adds up to $81,800, the

trial court has certainly not indicated what that combination is. Although Woodward v. Fazzio, 823 P.2d 474 (Utah Ct. App. 1991), involves a termination of parental rights, Woodward is a case in which the nature of the trial court's findings prevent a reasonable resolution of the case and, therefore, can clearly be applied to Finding 13 in the instant case. In Woodward v. Fazzio, the Court of Appeals stated that marshaling the evidence reminds both the litigants and the appellate court of the high degree of deference that is accorded the finder of fact, Woodward, 823 P.2d at 477 (quoting State v. Moore, 802 P.2d 732, 739 (Utah Ct. App. 1990). "However, we will only grant this deference when the findings of fact are sufficiently detailed to disclose the evidentiary basis for the court's decision." Woodward, at 478.

Although a trier of fact's finding of fact is generally entitled to great deference, in this case, Finding of Fact 13 simply does not deserve that type of consideration. Because Finding 13 is not clear as to how it is supported by the evidence in this case, it must be stricken and revised to reflect its evidentiary basis and to conform to that evidence. The reasonable value of the improvements to the Alexander property is the contract price, less a reasonable amount to complete the items identified to the Contract. Based on competent testimony, that amount was less than $5,000 so that Finding 13 should have equaled $91,600.

POINT II: The trial court erred when it concluded that the "reasonable amount of completing the work identified to the contract is $18,210."

The difficulty with the trial court's conclusion that the cost of completion of the contract is that there is no indication of how the court made this determination. The question of the cost of contract completion is central to this case, because the appropriate measure of damages is the contract price less the reasonable cost to complete the contract. See, Stangl v. Marathon Steel Company, 554 P.2d 1316 (Utah 1976). However, because there is no factual support for this amount, the damages cannot be accurately determined. If for no other reason than that, this conclusion must be reversed and remanded to the trial court for reconsideration.

Alexander testified that he could have completed the work on the contract and insulated the house in the winter of 1995, but that he did not take the required remedial steps to protect his residence, because he did not want to cover up any evidence to support his case so that he did not want to do anything until his lawyers told him he could. (R. 379 at 63). Instead, Alexander let the house deteriorate, and now believes that the cost of repairing the house will be $101,920.05. On that basis, Alexander believes that he should be entitled to receive $34,320.05 from Fortune (Defendant's Proposed Findings of Fact and Conclusions of Law, R.200-05 at 201). There is no

support for Alexander's proposition, and it is clear from the trial court's judgment that the trial court refused to accept Alexander's wishful thinking. It is wholly unclear, however, how the trial court arrived at its conclusion as to the cost of completion of the contract.

Fortune's expert, a certified structural engineer, presented competent evidence that the cost of completion was less than $5,000. Alexander's contractor, who admitted that he did not receive engineering specifications for the work that he did and that he did not have an engineering background himself (R. 0249 at 89-90), testified that the cost to repair the house was anywhere from $46,785 to $101,920. But none of the evidence supports the conclusion that the cost to complete the contract was $18,210.

A trial court's conclusion of law is not entitled to deference on review by an appellate court. K.J. Scharf v. BMG Corporation, 700 P.2d 1068, 1070 (Utah 1985). Admittedly, this conclusion appears to be more factual than legal, but the trial court itself determined that its statement as to the cost of completion of the contract was a conclusion of law. This Court is, therefore, entitled to simply review for correctness. Id. Because the trial court's conclusion is without support, it is not correct, and must be stricken.

POINT III: The trial court's determination of the amount of damages to which Fortune is entitled fails to appropriately apply Utah law and must be corrected.

The trial court found that the "reasonable value" of Fortune's work in making improvements to Alexander's property was "not less than $81,800," and that Defendant had only paid $30,000. (R. 239 Finding 13). While there is no dispute that Alexander only paid Fortune $30,000 on the $97,600 Contract, there is dispute as to the value placed on Fortune's work. Similarly, Fortune challenges the trial court's conclusion that the cost to complete the items identified to the Contract is $18,210. Even assuming, however, that the trial court can establish the basis for the $81,800 amount and for the $18,210 amount, the trial court has not correctly applied Utah law by awarding Fortune damages in the amount of $33,590.

In order to arrive at the damage award, the trial court took the "reasonable value of the improvements," and subtracted the amount paid by Alexander and the "reasonable amount of completing the work identified to the contract." In light of the fact the trial court ruled that there was a contract between these parties (R. 240 Finding 1), the trial court's calculation of damages is incorrect.

> It is undisputed law of this state and the general consensus of legal writers that breach of construction damages are based upon the total amount promised for the project, less the reasonable cost of

completing it.

Holman v. Sorenson, 556 P.2d 499, 500 (Utah 1976). In John Call Engineering, Inc. v. Manti City Corp., 795 P.2d 678 (Utah Ct. App.1990), a construction case in which Manti City had been found to have breached an engineering contract with the plaintiff, the court specifically followed Holman. Damages were, therefore, to be calculated based on "the amount plaintiff would have received had the contract been completed less the expenses plaintiff saved by not having to perform." Id. at 681.

In Keller v. Deseret Mortuary Company, 455 P.2d 197 (Utah 1969), the Utah Supreme Court responded to a defendant's argument that the plaintiff should have only been able to recover "the reasonable value of the work performed and the materials furnished," which is basically what the trial court concluded in the instant case. On the contrary, the Court stated that where a construction claim is based on a definite contract, the trial court had properly awarded damages based on "the total amount promised or the project, less the reasonable cost of completing it." Keller, 455 P.2d at 198.

The correct measure of damages in this case would, therefore, be the contract price of $97,600, less the payment of $30,000, and less the reasonable cost to complete the items identified to the Contract, as established by competent evidence. Because the trial court failed to properly apply Utah

law when it awarded damages to Fortune in this case, and because the trial court's conclusion as to the cost of contract completion is unsupported in the record, the Court must vacate the damage award and remand for a redetermination of damages based on competent evidence and the applicable law.

POINT IV: The trial court's failure to award attorney's fees to Fortune constitutes error.

After Alexander failed to pay Fortune, Fortune filed a mechanic's lien on the Alexander property, pursuant to Utah statute. *Utah Code Annotated* §38-1-1 *et seq.* Fortune properly gave notice of the lien by mail to Alexander as the owner of the real property pursuant to *Utah Code Annotated* §38-1-7, Plaintiff's Complaint at ¶¶ 16, 18 (R. 016-17); Defendant's Answer at ¶¶ 16, 18 (R. 031), and the trial court so found. (R. 239 ¶ 11). The trial court noted that the lien failed to subtract the specific amount necessary to complete the contract, "but was otherwise accurate." (R. 239 ¶ 12). On that basis, the trial court ruled in Fortune's favor that "It is reasonable and proper that Plaintiff be allowed to foreclose its mechanic's lien." (R. 240 ¶ 3). The court then ruled that each party was to bear its own legal fees and costs. (R. 240 ¶ 4). That ruling constitutes error in light of Utah law.

The purpose of the mechanic's lien statutes is protection of those who

increase the value of real property by supplying materials or labor, and the statutes will be liberally construed to promote that purpose. Interiors Contracting Inc. v. Navalco, 648 P.2d 1382 (Utah 1982). Awarding fees and costs to a party prevailing in an action to foreclose a lien is part of the protection afforded, because otherwise a contractor might not have sufficient resources to obtain the protection that the statutes are designed to provide. The statutory scheme places certain limitations and requirements on the right to receive fees and costs, but once those limitations and requirements are satisfied, the party is entitled to an award of costs and fees. Examples of such limitations and requirements are the time limits in which to file the notice of lien, the requirement that notice of the lien be provided to the property owner, and the requirement that the lien claimant prevail in the action to foreclose the lien. Thus, *Utah Code Annotated* Section 38-1-7 provides:

> (1) A person claiming benefits under this chapter shall file for record with the county recorder of the county in which the property, or some part of the property, is situated, a written notice to hold and claim a lien within 90 days of the date:
>
> (a) the person last performed labor or service ... for a residence as defined in Section 38-11-102;
>
> ...
>
> (4)(c) Failure to deliver or mail the notice of lien to the reputed owner or record owner precludes the lien claimant from an award of costs and attorneys' fees against the reputed owner or record owner in an action to enforce the lien.

Because Fortune timely filed its lien and did not fail to mail the notice to

Alexander (R. 016-17; R. 031; R.239), Fortune has satisfied the requirements of Section 38-1-7, such that Fortune is entitled to an award of its costs and fees.

Similarly, *Utah Code Annotated* Section 38-1-18 provides:

> Except as provided in Section 38-11-107, in any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action.

(Emphasis added). The trial court ruled that Fortune is properly entitled to foreclose its lien on the Alexander property, which makes Fortune the successful party in this matter and the award of reasonable attorney's fees is, therefore, mandatory.

In a very recent case, J.V. Hatch Construction, Inc. v. Kampros, 971 P.2d 8 (Utah Ct. App.1998), this Court held that because Section 38-1-18 provides that the successful party in a mechanic's lien case is entitled to fees, the lien claimant's prima facie evidence establishing the entitlement to fees is proof that the claimant is the prevailing party. Fortune has established that it is the prevailing party: the trial court granted Fortune the right to foreclose its lien. (R. 240 ¶ 3). Therefore, there is no basis on which to deny Fortune an award of reasonable attorney's fees incurred in this matter.

In at least one Utah case in which the plaintiff contractor sued to foreclose a mechanic's lien and to recover for the owner's breach of contract,

the trial court refused to award attorney's fees to either party, although the court did award damages to the plaintiff. Holman v. Sorenson, 556 P.2d 499, 501 (Utah 1976). In Holman, the defendant had counterclaimed against plaintiff for breach of contract, and the trial court ruled that both parties had breached the contract, but awarded plaintiff "net damages." Id at 500. There is dicta in the case regarding the possibility that the trial judge may have found the mutual breach "to avoid what appeared to be the mandatory language of [section] 38-1-18," but there is no further treatment of the issue. Holman may be distinguished from the instant case based on the clear ruling of the trial court that Fortune may foreclose its mechanic's lien and that Fortune is entitled to damages based on its claims of breach of contract, quantum meruit and unjust enrichment (R. 240 ¶¶ 2,3,5,6). Significantly, unlike Holman, in this case there is nothing in the trial court's judgment that reflects that Fortune in any way breached the Contract.

If the contractor is allowed to foreclose its mechanic's lien, this Court has held that the contractor is entitled to a reasonable attorney fee. Bailey v. Call, 767 P.2d 138 (Utah Ct. App. 1989), *cert. denied* 773 P.2d 45 (Utah 1989). The trial court's denial of attorney fees in Bailey was reversed and the case was remanded to the trial court for a determination of reasonable attorney fees. Id. Similarly, in Reeves v. Steinfeldt, 915 P.2d 1073 (Utah Ct. App.), the court looked at the language of Section 38-1-18, held that "[t]he language of the

statute is mandatory, not discretionary," id at 1079, and remanded to the trial court for an award of fees.

Finally, an appeal from a lawsuit that is brought to enforce a mechanic's lien is considered to be part of the action to which Section 38-1-18 refers, so that the successful party in an appeal will be entitled to an award of fees. Richards v. Security Pacific, 849 P.2d 606 (Utah Ct. App. 1993), *cert. denied*, 859 P.2d 585 (Utah 1993). See also, J.V. Hatch Construction, Inc. v. Kampros, 971 P.2d 8, 16 (Utah Ct. App. 1998).

This Court should, therefore, reverse the trial court's denial of attorney fees and costs, and remand for an award of reasonable fees and costs incurred by Fortune both at trial and on appeal.

CONCLUSION

This construction case is based on a contract which one party tried to fulfill and the other party did not. Fortune worked hard to build the first stage of the residence that Alexander wanted, which is all that was required of Fortune under the Contract. What Alexander had to do was to pay Fortune what Alexander had agreed to pay, and not interfere with the construction process, but Alexander did not do that. When Alexander failed to pay Fortune pursuant to the Contract terms, Alexander breached the Contract, and Fortune left the job because it was not getting paid. At that point, what Alexander had to do was to finish the various items that were necessary to protect the

building from the harsh local weather conditions, but Alexander did not do that, either.

Alexander had the benefit of owning and using the residence for almost two years without taking the responsibility to finish what was needed to protect the building, let alone taking the responsibility to pay Fortune for its work on the residence. Alexander would like to hold Fortune responsible for all of the problems that have been caused by almost two years of neglect, but the trial court did not allow that.

The trial court awarded judgment in favor of Fortune and ruled that Alexander failed to take the steps that were necessary to protect the property, that Fortune can foreclose its mechanic's lien on the Alexander property, and that Fortune is entitled to damages. The trial court did not, however, base its finding as to the reasonable value of the improvements to the property on evidence that can be determined in the record. Similarly, the trial court's conclusion as to the reasonable cost of completion of the work identified to the Contract is unsupported in the record, and the trial court failed to apply Utah law in determining the amount of damages to which Fortune is entitled in this matter. Finally, the trial court failed to award fees and costs to Fortune, despite the statutory mandate to do so. For those reasons, Fortune has filed this appeal.

Fortune, therefore, asks this Court to strike the trial court's Finding of

Fact 13, reverse the Conclusions of Law that improperly determine the reasonable cost of contract completion and damages, and reverse the trial court's denial of reasonable fees and costs incurred in this matter, with instructions to determine and award fees and costs to Fortune, as reasonably incurred at trial and in this appeal.

Dated this 26th day of March, 1999.

Janet A. Goldst

James W. Kennicott
Janet A. Goldstein
Attorneys for Plaintiff/Appellant and Cross-Appellee, Fortune Construction, Inc.

CERTIFICATE OF SERVICE

I certify that on the 26th day of March, 1999, I caused to be served two true and correct copies of the foregoing BRIEF OF APPELLANT by hand-delivering same to Defendant/Appellee/Cross-Appellant's counsel as follows:

Ralph Curtis
HENRIKSEN & HENRIKSEN
320 South 500 East
Salt Lake City, UT 84102

Janet A. Goldstein

Exhibit A

No.

FILED
OCT 21 1998
By Third District Court
Deputy Clerk, Summit County

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SUMMIT COUNTY, STATE OF UTAH

FORTUNE CONSTRUCTION, INC., a Utah Corporation	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW
Plaintiff,	:	
vs,	:	
LARRY K. ALEXANDER,	:	Case #950300151LM
Defendant,	:	JUDGE PAT B. BRIAN

FINDINGS OF FACT

This matter having come before the court for trial on August 12, 1997, continuing on December 10, 1997 and final arguments having been heard on December 23, 1997 and the Court being fully advised herein, the Court enters the Findings of Fact as follows:

1. The only contract between the parties is Plaintiff's exhibit "N" which was signed by the parties on September 25, 1995.

2. The Contract price was $97,600, due in four installments of which Defendant paid only the first installment of $30,000.

3. Defendant failed to pay the second, third and fourth installments due under the contract.

5. After Defendant refused to make the payment, Plaintiff

File has been in Salt Lake

continued to work at the job site for four to five days to protect the structure from the effects of winter at 8,000 feet.

6. Defendant failed to complete the work identified in the contract until ordered by the Court on August 12, 1997, despite a letter from Joseph Crilli, professional engineer, indicating the need to complete certain items.

7. Defendant failed to take action for over 18 months to protect the structure from degradation caused by leaving the structure unprotected from weather and moisture.

8. On August 12, 1997 the Court ordered Defendant to complete the contract work to protect the structure from another winter's exposure.

9. Defendant failed to do the work ordered by the Court on August 12, 1997.

10. Defendant could have installed a moisture barrier and insulation before the winter of 1995, but did not do so.

11. Plaintiff timely filed notice of a lien against Defendant's property in the amount of $67,600 and provided Defendant with timely notice of the lien filing.

12. The notice of the lien failed to subtract the amount necessary to complete the work identified to the contract from the contract price, but was otherwise accurate.

13. The reasonable value of the improvements to Defendant's property is not less than $81,800 which Defendant has only paid $30,000.

CONCLUSIONS OF LAW

Having entered the foregoing Findings of Fact, the Court

reaches the following Conclusions of Law:

1. The reasonable amount of completing the work identified to the contract is $18,210.

2. It is reasonable and proper that the Plaintiff be awarded the sum of $81,800 less the foregoing cost of completion and the initial payment amount of $30,000.

3. It is reasonable and proper that Plaintiff be allowed to foreclose its mechanic's lien.

4. Each party shall bear their own legal fees and costs.

5. It is reasonable and proper that Plaintiff be awarded the sum of $33,590 for the reasonable value of materials and services provided for the benefit of Defendant on Plaintiff's claim for *quantum meruit*.

6. It is reasonable and proper that Defendant pay to Plaintiff the sum of $33,590 as compensation on Plaintiff's claim for unjust enrichment.

JUDGMENT

Having reached the foregoing Conclusions of Law, the Court enters Judgment in favor of Plaintiff in the sum of $33,590.

DATED this 21 day of August, 1998.

Pat B. Brian, Justice Judge

Exhibit B

his agreement is between (Contractor):

Fortune Construction, Inc.
P. O. Box 684
Midway, UT 84049
(801) 654-2337

Date: September 22, 1995
Project name: Alexander (INV 64)
Address: Forest Meadow
Lot D-100
City, State, ZIP: Summit County

.nd (Owner):

.ame: Larry Alexander DBA Intrepid Transportation, Inc. JA
.ddress: 1576 South 1000 East
.ity, State, ZIP: Salt Lake City, UT 84105

.ontractor will furnish all labor and materials to construct and complete the project described above in a good
.orkmanlike manner: Design/Draft Blue Prints, Coordinate Excavation/Septic System/ Utah Power/Water Service
edestal to Street, Power, Foundation, Framing, Ext. Windows and Doors, Building Permit, Dry-in, Rough Plumb,
lectrical, Heat, Steel Roof.

.n accordance with following contract documents: Building Permit #95462 - Summit County, UT, and Blue Prints
.ages 1-13) engineered by Joseph Crilly, P.E., (93261981-2202) dated 7/4/95

.wner agrees to pay Contractor the total sum of: $97600.00
.nstallments to be made as follows: $30,000 to begin (received) which includes $14,781.10 paid out by contractor to date of 9/7/95
$30,000 upon completion of exterior wall, rough plumbing and rough electrical.
$30,000 upon completion of truss installation and dry-in.
$7,600 balance upon completion of windows/doors and steel roof install ($9,760 contingency)

unds are to be disbursed by: Any contingency expenditure cannot be made without the written permission of owner. DA

.ork shall commence: 9/7/95

nd shall be complete within the following number of working days: 180 days weather permitting

.wner signature: [signature] Contractor: [signature]

.ate signed: 9/25/95 Date signed: 9-25-95

[redacted]