

1956

Richard Whipple v. Harold Fuller : Appellant's Petition for Rehearing

Utah Supreme Court

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Forrest W. Fuller; Attorney for the Appellant;

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CASE NO. 8409

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IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED
SEP 19 1956

RICHARD WHIFFLE,

Plaintiff and Respondent,

-VS.-

HAROLD FULLER,

Defendant and Appellant.

APPELLANT'S PETITION FOR REHEARING

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Attorney for the Appellant

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Received two copies of the foregoing brief this
day of September, 1956.

Respondent

Respondent

IN THE SUPREME COURT
OF THE STATE OF UTAH

RICHARD WHIPPLE,

Plaintiff and Respondent,

-vs.-

HAROLD FULLER,

Defendant and Appellant.

Case

No. 8409

APPELLANT'S PETITION FOR REHEARING

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of Utah:

The Appellant respectfully requests a rehearing in the above-entitled cause for the reasons and upon the grounds following, to wit:

That the above Court erred in its conclusions in the above-captioned case; that said Court's decision was based on a wrong principle of law; that said Court has overlooked prior decisions in point which should affect the result; and that the Court has misapplied principles which materially affect

the result.

That for the foregoing reasons and grounds the Court erred in holding that an unlicensed subcontractor could successfully maintain an action against the Appellant.

Therefore, the Appellant respectfully submits that a rehearing should be had and the decisions revised as to the law, believing that a re-examination of the cause will result in a reversal of the decision herein, and that a miscarriage of justice will occur if this case is not reversed.

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SALT LAKE CITY, UTAH

CASE NO. 8409

DEC 12 1956

MAJ. JUDGE
C. J. C.

IN THE SUPREME COURT
OF THE STATE OF UTAH

Clerk, Supreme Court

RICHARD WHIPPLE,

Plaintiff and Respondent,

-VS.-

HAROLD FULLER,

Defendant and Appellant.

APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR
REHEARING

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Received two copies of the foregoing brief
this _____ day of September, 1956.

Respondent

TABLE OF CONTENTS

Statement of Points	1
Argument	1

Authorities Cited

Page

Alvarado v. Davis, 11 C. A. 762, 8 F. 2d 121	3, 11
12 American Jurisprudence 713	4
12 American Jurisprudence 721, 729	4, 7
30 American Law Reports 649	3
42 American Law Reports 1227	3
Baer v. Tippet, 34 C.A. 2d 38, 92 P. 2d 1028	4
Board of Education v. Elliott, 276 Ky. 700, 125 S. W. 2d 738	4
Bellinger v. Wiman, 14 A. 2d 91	4
Cash v. Blackett, 370, A. 2d 239, 196 F. 2d 555	3
33 Corpus Juris Secundum 714	3
Dow v. United States, 154 F. 2d 707	7, 9
Eklund v. Smith, 116 U. 2d, 211 F. 2d 649	3, 5, 9
Erie v. Tompkins, 38 S. Ct. 517, 304 U. S. 64	3
Gianti v. Crown Motor Co., 25 A 2d 625	3
Garrison v. Brady-McGowan Co., 48 I. 2d, 201 F. 370	4
Harris v. Clark, 81 Ind. A. 494 142 N. E. 891	4
Hickey v. Sutton, 210 N. W. 704	4
Kirman v. Forange, 65 C. A. 2d 159, 150 P. 2d 3	6
Matchett v. Gould, 201 F. 2d 594	7, 8, 9, 11
Olson v. Reese, 114 U. S. 411, 200 F. 2d 758	3, 5, 9, 11
Sherwood v. Wise, 132 N. 295, 232 P. 299	3
Utah Code Annotated, 1953, 14-2-1, 2	11
Utah Code Annotated, 1953, 58-6-1	6
Utah Code Annotated, 1953, 18-3-2	11

**IN THE SUPREME COURT
OF THE STATE OF UTAH**

RICHARD WHIPPLE,

Plaintiff and Respondent,

-vs-

HAROLD FULLER,

Defendant and Appellant.

Case

No. 8408

**APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR
REHEARING**

STATEMENT OF POINTS

**THE COURT ERRED IN HOLDING THAT THE RESPOND-
ENT, AN UNLICENSED SUBCONTRACTOR, COULD SUCCESS-
FULLY MAINTAIN ANY ACTION AGAINST THE APPELLANT.**

ARGUMENT

**There can be no argument at this late date
as to the correctness of the facts relied upon by
this Court in reaching its decision, and the Appel-
lant makes no attempt herein so to do.**

**In arriving at its decision the Court fails to
consider, or at least fails to mention, two Utah**

cases squarely in point with the disability of unlicensed contractors to maintain actions not dissimilar to the one sought to be prosecuted by the Respondent in the instant cause. In Olsen v. Reese, 114 U. 411, 200 P. 2d 733, this Court said:

"We are of the opinion the complaint was vulnerable to a general demurrer. There are authorities holding that it is not necessary for a plaintiff to allege he is a licensed contractor... However, this Court is committed to a contrary doctrine ...

"In accordance with our holding in the previous case, (Smith v. American Packing & Provision Co., 102 Utah 551, 130 P. 2d 551) in order to state a cause of action, it was necessary for plaintiff to allege he was a licensed contractor at the time the contract was entered into...

"The statute being enacted for the protection of the public, plaintiff's written contract is void..."

The Court was of course construing the same sections of the Utah statutes dealing with the licensing of contractors as it must construe in the instant cause. While it is true that in the Olsen case the Court only decided that the contracts of unlicensed contractors are void, and

in fact specifically reserved the question of whether such an unlicensed contractor could recover under a theory of quantum meruit any doubt was dispelled by the same Court's decision in Elwood v. Elgall, 116 U. 521, 211 P. 2d 849, the second Utah case apparently overlooked. This latter case was an action in assumpsit; and although grounds were alleged for recovery under quantum meruit, Briefs, Vol. 590, No. 7358, page 12, Respondent, no attempt was made by the Court to discuss these grounds; and the same result was obtained as in the Olson case. That an unlicensed person required by law to secure a license cannot maintain an action for the value of his services indirectly under the guise of quantum meruit just as he is precluded from maintaining an action on his original contract is the general rule of law in the United States today and is well supported by authority. 30 A. L. R. 843; 42 A. L. R. 1227; 53 Corpus Juris Secundum 714; Sherwood v. Wise, 152 W. 295, 282 P. 309; Cash v. Blackett, 87 C. A. 2d 233, 196 P. 2d 585; Alvarado v. Davis, 118 C. A. 782, 6 P. 2d 121; Gionti v. Crown Water Co.

20 A. 2d 292; Board of Education v. Elliot, 278 Ky. 799, 125 S. W. 2d 739; Harris v. Clark, 81 Ind. Ap. 484, 142 N. E. 661; Baer v. Tippet, 34 C. A. 2d 92 P. 2d 1029; Bollinger v. Widman, 14 A. 2d 61; Hickey v. Sutton, 210 N. W. 704; Coranese v. Brady-McGowan, 48 I. 261, 261 P. 370; and 12 AMERICAN JURISPRUDENCE 713, Section 209, 721, 729. The broad general theory supporting these cases is not whether an unlicensed person required by law to secure a license can recover under his contract, quantum meruit, assumpsit, special or general, or any other technical form of pleading, but rather that the courts of the land refuse to lend their dignity to the enforcement of illegal contracts, rights growing therefrom, or from acts performed thereunder, or acts in violation of the licensing statutes themselves; and the cases and authorities above cited support this broad general rule. It is to be noted that the Utah Supreme Court in both the Olsen and Eklund cases, *supra*, ruled that the plaintiff in such cases has failed to state a cause of action unless he alleges that he was a

licensed contractor at the time the services were performed and that a failure to do so justifies the trial court in sustaining a general demurrer and consequent dismissal. In the instant case the Respondent alleged falsely that he was a licensed contractor. In view of the general proposition, supported by the cases and authorities cited to the effect, that it is not the action which is barred, but rather that the unlicensed plaintiff has no standing in court to maintain the action, a completely discredited allegation is not alone enough to give the Appellant any greater standing in court than he would have had without the allegation. If the decision in this case is allowed to stand, and it is not held to reverse the prior decisions in Olsen v. Hansen, and Edlund v. Smith, *supra*, it must reverse the only decisions and broad principles upon which they or the general American rule rest.

A licensed plumber cannot maintain any action in the courts resulting from an undertaking to do plumbing work on a contract basis without first

showing that he had a contractor's license. Kirby v. Borst, 65 C. A. 2d 158, 150 P. 2d 8. The same literal construction of the provisions of Section 58-6-1, Utah Code Annotated, 1953, as applied by the court in construing 14-2-2 would dictate that the words "shall include subcontractor" preclude the possibility of exempting subcontractors from the purview of the sanctions imposed on general contractors, simply because the general contractor for whom they contract is licensed. If all general contractors must be licensed, and there must in fact be a general contractor before there can be a subcontractor, then the decision heretofore entered in this case would insist that the legislature, in including the foregoing words, was merely adding meaningless surplusage to the act.

Any decision in the instant case would result in hardship. A decision in favor of the Appellant would mean that the Respondent will have supplied materials and labor without compensation and a contrary provision would mean that the Appellant will have to pay twice for the work and materials.

Either could have prevented the necessity of any decision on the part of this court or any other court by complying with the laws of this State. The parties are in pari delicto, and the law will leave them where it finds them. 12 AMERICAN JURISPRUDENCE 721, 729.

It is to be noted that both Dow et al v. Utah States for Use and Benefit of Heller, 154 P. 2d 707, and Hatchett v. Gould, 281 P. 2d 524, deal with a distinct exception to the general rule that an unlicensed person cannot maintain any action and held that where a general contractor, partner, agent, or assignee has collected in full the proceeds of the work done by the unlicensed person or persons that the courts will not allow the licensing laws to be used as a sword instead of a shield. In neither case did the facts involve the person for whom the services were performed as they do in the instant case. Neither case overrules the general rule of law in such cases. The rather general provisions in the Dow case cited by this court in its decision

are not germane to the issue in the Boy case nor in arriving at the rule laid down by the California court in the Hatchett case; but even if they were decisive this Court to apply them to the instant case would have to overrule Erie RR Co. v. Tompkins 38 S. Ct. 817, 304 U. S. 64, 82 L. Ed. 1138, 114 A. L. R. 1487, inasmuch as the Boy case was decided in March, 1946, while Olsen v. Reese, supra, was decided in December of 1948, and Eklund v. Eivell, supra, was decided in November of 1949, the Erie case requiring the Federal Courts to apply the substantive common law of the states whose statutes control the cause. Prior to the decision in the present case, the Federal Courts would be bound by the Olsen and Eklund cases subsequent to 1948 and 1949, respectively.

Assuming that the general language cited by this Court from the Hatchett v. Gould case, supra, were to apply to this case, would "equity and good conscience dictate" that the Appellant, who has already paid once for the work done, pay again while "equity and good conscience dictate" that

the property owners in Kling v. Ewell, supra, and Olsen v. Leese, supra, receive the benefits of the labors and materials supplied by the unlicensed contractors without any cost. The general rule as announced heretofore does not assume that the person for whom the unlicensed party performs services is entitled to receive the services as a matter of right simply because that party fails to procure the necessary license; in fact, the cases cited in support of the general rule recognize that once the consideration is paid, the beneficiary of the services has no right to recover the consideration back, even though he would not have been required by law to pay it in the first instance. Both the Day and Witchett cases specifically recognize the general rule but distinguish the facts. In the former an unlicensed subcontractor sued a licensed contractor for his share of the proceeds of the job in the hands of the licensed contractor and in the latter, an unlicensed contractor sued an unlicensed subcontractor for the proceeds of the job in question. The difficulty in both cases was

to bring the aggrieved party within the classification protected by the licensing acts themselves, and this was done in both cases. In the instant case, there is no question that the Appellant was a part of the public protected by the licensing statute. Both cases require that an unjust enrichment take place before the exception to the rule is applicable. "The necessity of doing justice through forestalling unjust enrichment is the controlling consideration." Matchett v. Gould, supra, at page 529. In the instant case no unjust enrichment results from a decision favorable to the Appellant. He has already paid full consideration. In the By case, the plaintiff was an indirect third party beneficiary of the contract between the Government and the defendant, while in the Matchett case, there was an assignment of the contract from which the proceeds were derived by the defendant to the plaintiff. Both cases would be good law and would no doubt be applied were the Respondent suing the general contractor, but neither has application where he is suing the owner of the property.

A similar set of facts to the present case were presented to the California Court in Alvarez v. Davis, 115 C. A. 782, 6 P. 2d 121, wherein an unlicensed contractor sought to enforce a lien under the lien laws protecting materialmen and laborers, just as do the bonding laws of this State and California, against the owner of property (a member of the public protected by the licensing acts) and that Court held that the failure to procure the license barred recovery.

The "all persons" of Section 14-2-2, Utah Code Annotated, 1953, cannot include persons who by the general rule cited are precluded from maintaining any action on an illegal contract or rights growing therefrom as against the public protected by the licensing law any more than it could include unlicensed foreign corporations who are precluded by statute from maintaining any action in the courts of this State under all circumstances including the present one. Utah Code Annotated, 1953, Section 16-2-3. The legislature of this State would surely see the fallacy in making certain acts criminal if done without a license and then specifically regard

the perpetrators of these criminal acts with a special right of action against the public sought to be protected by the enactment of the licensing sections. Such irresponsible legislative intent would compare quite favorably with allowing the murderer to inherit the property of his victim or the robber to keep his gains.

Respectfully submitted,

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